Supreme Court
FILED

962022 JUN 9 1997

No. OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1996

EMILY HUDSON, by and through
her parent, Sharon Hudson,

Petitioner,

v.

BLOOMFIELD HILLS PUBLIC SCHOOLS,

Respondent,

MICHIGAN DEPARTMENT OF EDUCATION,

Defendant.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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June 6, 1997

128 pp

QUESTIONS PRESENTED

This case centers on the least restrictive environment provision of the Individuals with Disabilities Education Act (IDEA), which is designed to assure the integration of children with disabilities into regular education to the maximum extent appropriate. Three questions are presented:

> Whether a child with a disability's ability to achieve satisfactorily in regular education classes, integrated with nondisabled children, is to be determined by assessing the child's progress on his or her individual goals, rather than measuring the child's progress on the general regular education curriculum.
>
> Whether the "supplementary aids and services" which must be considered when determining a child's ability to achieve satisfactorily in regular education include providing the child with periodic instruction in a special education resource room.
>
> Whether a child who has been assessed by her school district as making satisfactory progress on her individual goals in integrated, regular education classes without disrupting others is entitled to be placed in the regular education environment.

PARTIES TO THE PROCEEDING

All of the parties to this proceeding are listed in the caption.

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No. _____

In The
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EMILY HUDSON, by and through
her parent, Sharon Hudson,

Petitioner,

v.

BLOOMFIELD HILLS PUBLIC SCHOOLS,

Respondent,

MICHIGAN DEPARTMENT OF EDUCATION,

Defendant.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Sharon Hudson, on behalf of her minor daughter, Emily Hudson, petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, App., *infra,* 1a-3a, is reported at 108 F.3d 112. The Court of Appeals adopted the opinion of the District Court, App., *infra*, 4a-51a, which is reported at 910 F.Supp. 1291.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on March 13, 1997, App., *infra,* 1a-3a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

> [T]o the maximum extent appropriate, children with disabilities . . . [shall be] educated with children who are not disabled, and . . . special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.
>
> 20 U.S.C. 1412(5)(B).

Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.

34 C.F.R. 300.552(c).

(a) Each public agency shall ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

(b) The continuum required in paragraph (a) of this section must . . . [m]ake provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

34 C.F.R. 300.551(b)(2).

STATEMENT OF THE CASE

In enacting the Individuals with Disabilities Education Act (IDEA), Congress carefully considered the need to provide children with disabilities with individualized instruction and services, while also clearly signaling that the regular education environment was the preferred location in which to deliver such services. To this end, Congress established the IDEA's least restrictive environment (LRE) provision, 20 USC 1412(5)(B), which mandates that a child with a disability who is capable of achieving satisfactorily in regular education with supportive services (known as "supplementary aids and services") is entitled to be placed in regular education.[1]

1. Facts.

For two school years, Emily Hudson was educated primarily in regular education classes at East Hills Middle School, the school she would normally attend if nondisabled. During this time, Emily was provided supplementary aids and services such as teacher consultant services to modify the curriculum for Emily's

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[1] Indeed, one of the pillars of the IDEA are seminal court decisions extending the equal protection principle of *Brown v. Board of Education,* 347 U.S. 483 (1954), to schoolchildren with disabilities. *See Smith v. Robinson,* 468 U.S. 992, 1009 (1984). This is not to suggest that integration is the sole purpose of the IDEA. In the present case, for example, the record shows that Emily benefits from being educated alongside appropriate role models for speaking and behaving, and such models are not available in the segregated special education classroom.

lower skill levels, social work services with Emily and her nondisabled friends to work on social and communication goals, and an instructional aide. By the School District's own criteria, Emily's achievement on her individual goals in regular education was satisfactory. She made progress on her academic skills, such as building her vocabulary and increasing her typing speed, and also met her socialization goals, such as expanding her range of social greetings and interaction and lessening her dependence upon adults. As her 7th grade social studies teacher testified, Emily worked on 17 of her specific educational goals contained in her Individualized Education Program (IEP) in the social studies class, and she made satisfactory progress.

Emily's two-year experience in the School District's regular education program also demonstrated that the District's concerns about disruption were unfounded, as Emily's progress on her individual skill levels did not result in any disruptive effect in the classroom and the education of Emily's nondisabled classmates.

After her second year at East Hills, and during the pendency of this litigation, Emily enrolled in a regular education private school, where she continues to function well and increase her academic and social skills. Emily's continued progress in regular education is such that she no longer needs the assistance of an instructional aide, as the private school has utilized a teacher consultant to establish a learning program for Emily which is geared to her lower cognitive level yet still related to the daily curriculum and course work of the class.

This litigation has centered on the IEP developed by the School District on April 14, 1994. Under this IEP, which has been upheld by the Sixth Circuit, Emily is to spend the great majority of her school day in a segregated special education classroom at another school, with limited mainstreaming into regular education elective courses such as art and music. Emily seeks to attend the school in her neighborhood, which has a special education resource room, a special education consultant, a school social worker, and other qualified personnel. In her neighborhood school, Emily would primarily attend regular education classes, where she has shown she can work on her modified curriculum without disrupting others and where appropriate language and behavior models for Emily are found. Emily would also receive daily itinerant instruction in a special education resource room.

2. Jurisdiction of the District Court.

The District Court had jurisdiction of this case pursuant to 20 U.S.C. 1415(e)(2) and 28 U.S.C. 1331.

REASONS FOR GRANTING THE PETITION

Petitioner asserts that Emily is exactly the type of child Congress had in mind when it provided for placement in regular education for a child with a disability who can achieve satisfactorily in such an environment with the help of supplementary aids and services. The exclusion of Emily from her normal school and classrooms flies in the face of Congressional policy and warrants this Court's attention.

In addition, there are three fundamental reasons why this petition should be granted:

1. The circuit courts of appeal are evenly split regarding the applicable standards for LRE cases;

2. The Sixth Circuit decision departs from critical standards governing LRE cases, including the need to focus on the child's individualized goals and the need to consider resource room instruction as an important supplementary aid or service;

3. School districts and families face uncertainty and under-enforcement regarding LRE.

There Is a Clear Split of Authority among the Circuits.

First, there is a clear split among the circuit courts of appeals regarding the applicable legal standards for determining school district compliance with the IDEA's least restrictive environment provision, 20 USC 1412(5)(B). The Sixth, Fourth, and Eighth Circuits have adopted the so-called *Roncker* test, whereas the Third, Fifth, and Eleventh Circuits have criticized the *Roncker* test as being unfaithful to the express language of Congress and have instead adopted the standards first articulated by the Fifth Circuit in *Daniel R. Compare Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1982), *cert. denied*, 464 U.S. 864 (1983); *Barnett v. Fairfax County School Board*, 927 F.2d 146 (4th Cir. 1991), *cert. denied*, 502 U.S. 859 (1991); and *A.W. v. Northwest R-1 School District*, 1813 F.2d 158, 163 (8th Cir. 1987), *cert.*

denied, 484 U.S. 847 (1987); *with Daniel R. v. State Board of Education*, 874 F.2d 1036, 1048 (5th Cir.1989); *Oberti v. Board of Education of the Clementon School District*, 995 F.2d 1204, 1215 (3rd Cir. 1993); and *Greer v. Rome City School District*, 950 F.2d 688 (11th Cir. 1991), *withdrawn*, 956 F.2d 688 (1992), *reinstated in part*, 967 F.2d 470 (1992). *See also Sacramento City School District v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994)(adopting different test).

The Sixth Circuit Decision Departs from Critical LRE Standards.

Second, this split among the circuits has proven to have significant impact in the present case, as the decision of the Sixth Circuit contains fundamental departures from the statutory and regulatory scheme established pursuant to Congress' expressed standards. These departures include:

The child's progress must be measured in light of her individualized goals.

The decision below essentially measured Emily's progress with reference to her ability to achieve regular education curriculum requirements. This severely undermines Congressional intent. Eligible children with disabilities, by definition, require special instruction and are assumed not to be able to perform regular curriculum requirements. 20 U.S.C. 1401(a)(1)(A)(ii) and 1401(16)(only children with disabilities who need specially designed instruction are eligible for special education). As the Fifth Circuit stated in *Daniel R.*:

> [R]equiring as a prerequisite to mainstreaming that the handicapped child be able to learn at approximately the same level as his nonhandicapped classmates fails to take into account the principles that the Supreme Court announced in *Rowley*. Our public school system tolerates a wide range of differing learning abilities.

Daniel R., supra at 1046.

Under the standards endorsed by the Sixth Circuit, mainstreaming will be a very rare occurrence, and the Congressional preference for placement in regular education will be turned on its head.[2] As other federal circuits and the U.S. Department of Education have found, the child's progress is to be assessed in light of the child's program on the individualized goals and objectives developed by his or her personal IEP, not by general standards. *Daniel R., supra* at 1046-47, *Rachel H., supra* at

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[2] This preference is expressed not only in 20 U.S.C. 1412(5)(B) but also in the 1990 amendments to the IDEA. In 1990, Congress established a funding priority for those schools which seek to educate children with severe disabilities "along side their non-disabled peers" and to "change the delivery of . . . services from segregated to integrated environments." 20 U.S.C. 1424(a)(3) and (5). Thus, Congress has clearly indicated that placement in regular education is intended for children with severe disabilities and not just for those children with mild impairments whose skills levels are close to their nondisabled peers.

1401, *Oberti, supra* at 1216-17, and *OSEP Memorandum 95-9*, 21 Inds. Disabl. Educ. Law Rep. 1152, 1154 (U.S. Dept. of Ed. 1994) (App., 89a-104a). This recognition of the need for fidelity to the child's unique individualized goals stands in stark contrast to the approach endorsed by the Sixth Circuit, under which the focus was on Emily's inability to "take similar tests and achieve at a level comparable to other 7th grade students." App., 42a.

Resource room instruction is a critical supplementary aid or service.

The decision below ignores the range of supplementary aids and services established by the regulatory scheme to assist the child's achievement in regular education. Specifically, the decision below fails to find that special education resource rooms, which by law must be able to provide itinerant instruction to support the child's attendance in regular education classes, are a mandated supplementary aid or service. In this regard, Emily's School District admits it does not provide direct instruction in the resource room, and this gap in the required special education continuum of services has been endorsed by the Sixth Circuit, in direct contravention of 34 C.F.R.

300.551[3] and the decisions of other circuits. As the Eleventh Circuit has stated:

> The Act itself mandates that a handicapped child be educated in the regular classroom *unless* such education cannot be achieved satisfactorily with the use of supplemental aids and services. Thus, before the school district may conclude that a handicapped child should be educated outside the regular classroom, it must consider whether supplemental aids and services would permit satisfactory education in the regular classroom. The school district must consider the whole range of supplemental aids and services, including resource rooms and itinerant instruction, for which it is obligated under the Act and the regulations promulgated thereunder to make provision.

Greer, supra at 696 (emphasis in original).

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[3] Significantly, Congress has taken the unusual step of expressly adopting the regulations promulgated by the U.S. Department of Education governing LRE. In 1983, a movement to water down the IDEA's LRE standards was facing Congress, and Congress responded by explicitly prohibiting promulgation of regulations to lessen LRE protections. 20 U.S.C. 1407(b).

In the present case, the record is clear that the School District did not consider resource room instruction as a supplemental aid or service, as it had established its resource room in such a manner that it did not provide direct instruction to individual students. This violation of 34 C.F.R. 300.551(b)(2) is endorsed by the decision adopted by the Sixth Circuit, which is devoid of any analysis of resource room assistance or, for that matter, supplementary aids and services in general. Because supplementary aids and services are almost always going to be necessary to implement the Congressional preference for regular education, the complete omission of this critical factor from the Sixth Circuit's framework of legal standards is alarming. Additionally, this failure to incorporate the availability of supplementary aids and services into the legal standards will inevitably lead to unnecessary segregation, as very few children will be able to benefit from regular education without consideration of these important support services.

Regular education is the primary placement option.

The decision below authorizes decision-makers to engage in a comparative analysis of possible placements rather than requiring them first to determine if the child can achieve satisfactorily in regular education with supplementary aids and services and, if the child can so achieve without disrupting others, to place the child in regular education, regardless of whether special

education staff feel their segregated program is better.

While the particular child's individual needs are the dominant factor in determining the child's placement, there is no doubt that school districts may not simply compare competing placements on an equal footing and decide which they feel is best for the particular child. Rather, the IDEA dictates that placement in regular education be fully considered as the first option and, further, that the child be placed in regular education if he or she meets the applicable standards of being able to achieve satisfactorily on his or her individual goals in such an environment with the help of supplementary aids and services. As the United States Department of Education has summarized:

> In implementing the IDEA's LRE provisions, the regular classroom in the school the student would attend if not disabled is the first placement option considered for each disabled child before a more restrictive placement is considered. If the IEP of a student with a disability can be implemented satisfactorily with the provision of supplementary aids and services in the regular classroom in the school the student would attend if not disabled, that placement is the LRE placement for that student.

OSEP Memorandum 95-9, *supra* at 1154. As an interpretation of its own regulations

> which is not plainly erroneous or inconsistent with the IDEA, the U.S. Department of Education's position is entitled to controlling weight. *Thomas Jefferson University v. Shalala,* 512 U.S. 504, 512 (1994).

There Are Uncertain Standards and Wide-Spread Noncompliance with the Congressional Preference for Mainstreaming.

A third reason for granting this petition is that there is much uncertainty and under-enforcement regarding LRE in the special education field. This Court has had eight previous occasions to interpret the IDEA, and each of these decisions has brought order and certainty to a controversial area of special education law.[4] *Board of Education of the Hendrick-Hudson Central School District v. Rowley,* 458 U.S. 176 (1982); *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984); *Smith v. Robinson*, 468 U.S. 992 (1984); *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985); *Honig v. Doe*, 484 U.S. 308 (1988); *Dellmuth v. Muth*, 491 U.S. 223 (1989); *Zobrest v. Catalina School District*, 509 U.S. 1 (1993); and *Florence County School District Four v. Carter*, 510 U.S. 7 (1993). However, this

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[4] A review of the judicial and administrative decisions in this area of the law reveals that a significant percentage of IDEA disputes involve LRE, including cases where a parent seeks tuition reimbursement after placing the child in private school to receive an integrated education and, conversely, cases where LRE is used as a school district defense to a parental request to place the child in a private special education center.

Court has not yet addressed the IDEA's most important provision: its regular education preference. 20 U.S.C. 1412(5)(B) is the point at which the civil rights and integration goals of Congress dovetail with the goal of providing quality educational programs for children with disabilities. As the Third Circuit has indicated, the IDEA policies favoring individualization and integration are reconciled in Section 1412(5)(B):

> The key to resolving this tension appears to lie in the school's proper use of "supplementary aids and services," 20 U.S.C. 1412(5)(B), which may enable the school to educate a child with disabilities for a majority of the time within a regular classroom, while at the same time addressing that child's unique educational needs.

Oberti, supra at 1214.

Thousands of decisions are being made on a daily basis regarding the placement of children with disabilities, and the fate of these children is now subject to the vagaries of the federal circuit, State, and school district in which the child happens to live. More often than not, Congressional priority is being stood on its head, as many children with mental retardation and other disabilities are simply slotted into the standard special education programs, without adequate attention to using supplementary aids and services to enable them to be integrated with nondisabled children and achieve in the regular education environment. In sum, the machinery created by Congress to extend *Brown v. Board of Education* to children with disabilities has broken down,

and the vision of a truly integrated society, in which persons with disabilities learn and work side-by-side with nondisabled persons is being thwarted. The existing split between the circuits regarding the governing standards makes this an opportune time to correct the imbalance which exists regarding this important question of federal law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 6, 1997

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APPENDIX A

[Issued as Mandate: April 7, 1997]

No. 96-1055

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EMILY HUDSON, by and through
her parent, Sharon Hudson.
Plaintiff-Appellant,

v.

BLOOMFIELD HILLS PUBLIC SCHOOLS,
Defendant - Appellee,

MICHIGAN DEPARTMENT OF EDUCATION,
Defendant.

BEFORE: MERRITT, RYAN, AND SUHRHEINRICH;
CIRCUIT JUDGES

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green, Clerk

[Decided and Filed March 13, 1997]
96-1055

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BEFORE: MERRITT, RYAN, AND SUHRHEINRICH; CIRCUIT JUDGES.

RYAN, Circuit Judge. Sharon Hudson filed this action pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.§ 1415(e)(2), to obtain federal court review of two state administrative decisions rejecting her challenge to the "individualized education program" (IEP) proposed for her daughter, Emily Hudson, by Bloomfield Hills Public Schools. The district court affirmed the judgment of the state hearing officer and Hudson filed the present appeal.

Hudson's principal arguments on appeal are substantially the same as the arguments she made before the district court. First, Hudson argues that the burden of proof has improperly been assigned to her throughout this protracted challenge to Emily's IEP. Second, she argues that the state hearing officer, the local hearing officer, and, most recently, the district court have improperly based their decisions on what they believe is "best" for Emily, rather than determining, as the IDEA requires, whether Emily can satisfactorily achieve the goals of her IEP in mainstream education classes. This is the crux of the dispute between Hudson and the school district. It is Hudson's belief that, with the assistance of certain

supplementary aids and services, Emily can be satisfactorily educated in her neighborhood school.

Before we may proceed to consider the district court's decision with respect to these questions, two issues must be resolved. First, we reject the school district's argument that this case is moot. At oral argument, we learned that Emily remains eligible for and interested in enrollment in the school district. Given the nature of the pedagogical and legal disagreements which underlie this case, we are satisfied that the present controversy is not moot because it is likely both to be repeated and to evade review. See, e.g., Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1039-41 (5th Cir. 1989). Second, we reject Hudson's argument that the district court erred when it refused to permit Hudson to submit additional evidence pursuant to section 1415(e)(2) of the IDEA. As the district court properly noted, Hudson's motion was not timely.

Turning to Hudson's principal arguments, we find, after a careful review of the record, that we are in agreement with the district court's reasoning and conclusions. Indeed, we find that we cannot improve upon the thorough and well-written opinion prepared by the Honorable Gerald E. Rosen of the district court; any effort to do so would be unwarranted and duplicative.

Accordingly, we adopt Judge Rosen's excellent opinion as our own, and for the reasons stated therein, hold that the district court's judgment should be AFFIRMED.

APPENDIX B

[Filed November 30, 1995]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EMILY HUDSON, by and through
her parent, Sharon Hudson,
Plaintiff,

vs.

BLOOMFIELD HILLS PUBLIC SCHOOLS,
Defendant.

No. 94-CV-74636-DT

JUDGMENT

At a session of said Court, held in the U.S. Courthouse, Detroit, Michigan on November 30, 1995.

PRESENT: Honorable Gerald E. Rosen
United States District Judge

The Court having this date entered an Opinion and Order granting Defendant's Motion for Summary Judgment, denying Plaintiff's Motion for Summary Judgment, and dismissing Plaintiff's Complaint in its entirety,

NOW, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that this be, and hereby is, DISMISSED in its entirety with prejudice.

/s/ Gerald E. Rosen
United States District Judge

APPENDIX B

[Filed November 30, 1995]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EMILY HUDSON, by and through
her parent, Sharon Hudson,
Plaintiff,
vs.

BLOOMFIELD HILLS PUBLIC SCHOOLS,
Defendant.

No. 94-CV-74636-DT

OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

At a session of said Court, held in the U.S. Courthouse, Detroit, Michigan on November 30, 1995.

PRESENT: Honorable Gerald E. Rosen
United States District Judge

I. INTRODUCTION

This action, brought pursuant to the Individuals with Disabilities Education Act ("IDEA"), is presently

before the Court on cross-motions for summary judgment. The parties have submitted extensive briefs in support of their respective positions and oral arguments were heard on November 9, 1995. Having reviewed and considered the parties' briefs and oral arguments, and further reviewed and considered the ten-volume record of the administrative proceedings held in this matter, the Court is now prepared to rule on the summary judgment motions. This Opinion and Order sets forth that ruling.

II. FACTUAL BACKGROUND

Sharon Hudson the mother of Plaintiff Emily Hudson, has brought this action appealing the decisions rendered in the administrative proceedings concerning the educational placement of her mentally-impaired daughter.

Emily Hudson is a developmentally disabled 14-year-old special education student certified as "trainable mentally impaired" ("TMI). [1] Emily has been receiving special education services since 1985 when she was evaluated as a pre-schooler and placed in an Early Development program. In 1988 she was designated as

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[1] Mentally impaired children are classified for special education purposes in Michigan according to the severity of their mental impairments. In degrees of severity, the most severe mental handicap is the "severely mentally impaired" ("SMI") classification. The next most severe impairment level is the "trainable mentally impaired" ("TMI") classification. The third classification is the "educable mentally impaired" ("EMI"). See Mich. Admin. Code R340.1703-1705 (1980) .

"trainable mentally impaired" and was enrolled in Oakland County's TMI program in Pontiac, Michigan. She remained in that placement through 1991. [See Local Hearing Officer's Decision, p. 1.] [2]

An "individualized education planning committee" ("IEPC") meeting was conducted in May 1991. That IEPC reconfirmed Emily's TMI status and recommended her placement a cross-categorical basic special education classroom[3] in the Rogers Elementary School in the Bloomfield Hills School District. She spent approximately 5 ½ hours. per day in the basic special ed classroom; the remaining time (1 to 1 and ½ hours per day) she was "mainstreamed" with the general education students.

The Bloomfield Hills School District services a student population of approximately 5600 students of whom approximately 656 are certified for special education services. The District has two high schools, three middle schools, and six elementary schools. There are currently four special education basic classrooms in the district: one pre-school basic classroom, two elementary basic classrooms and one middle school basic classroom. The middle school basic classroom is

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[2] The local Hearing Officer who conducted the five-day local administrative hearing and issued the first-level administrative decision is referred to in this Opinion as the "LHO". The subsequent state-level administrative appeal hearing officer is referred to as the "SHO".

[3] A "cross-categorical classroom services special education students with various disabilities

located at West Hills Middle School. It is called the "Learning Center."

In May 1993, when Emily reached the chronological age of a middle school student, an IEPC was held to consider a change in Emily's placement to a middle school setting.

The Committee recommended a middle school placement continuing with a split in Emily's school day, i.e., that she spend approximately three hours per day in a cross-categorical basic special education classroom, with the remaining time of the school day to be spent mainstreamed in the general education program. The School District wanted Emily placed in West Hills Middle School all day. Mrs. Hudson disagreed with that recommendation. She wanted Emily placed at East Hills Middle School (the middle school that she would attend if she were in regular education) all day, [4] and asked for a "due process hearing" pursuant to Section 1415(b) of IDEA and Mich. Admin. Code R340.1722a (1987) to contest the District's recommendation.

The parties, however, avoided a hearing by agreeing to a "trial placement" for the 1993-94 school year whereby Emily would "split" her time between West and East Hills. She was to spend 2 1/4 hours in the West Hills basic special education classroom, then she would take a ten-minute bus ride to East Hills where she would have lunch with the general education students and spend the afternoon in the regular sixth grade

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[4] East Hills does not have a basic special education classroom.

science/social studies, gym and art classes with a paraprofessional aide to assist her while she worked on her own work (as opposed to the sixth grade work the general ed students were doing), a concept known as "parallel instruction."[5]

By the end of the 1993-94 school year, this "trial placement" proved unsatisfactory to all parties. An IEPC was conducted in April 1994. The Committee once again recommended full-time placement at West Hills for Emily where she would spend approximately 3-4 hours a day in the Learning Center (i.e., the special education basic classroom) and the remaining time in regular education gym, art, home economics, drama and music classes ("unified arts") at West Hills. Primary emphasis for the completion of academic goals would be placed in the basic special ed classroom program. Mrs. Hudson did not agree with the April 1994 IEPC. It was (and still is) her position that Emily should attend East Hills for the entire school day and should be placed primarily in regular education classes, but could be "pulled out" of regular education 1-2 hours a day for intensive individual instruction in the Student Center. [6]

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[5] For example, when the regular social studies students were studying Latin America, Emily would be given first or second grade level coloring book-type worksheets of Mexico to work on.

[6] As noted above, East Hills does not have a basic special education classroom like the Learning Center in West Hills. According to the testimony of Sharon DiRezee, the East Hills Student Center coordinator, the Student Center is not a special ed

classroom; rather it is a resource center used by the entire East Hills student body and faculty, not just special education. For example, in addition to special education, the Center is utilized by gifted and talented students, bilingual education students, and at-risk students. Ms. DiReeze stated that over the course of a school day, 30 to 75 students utilize the center. It is essentially an enrichment center used for numerous activities such as hosting a "science olympiad" for the school, or for conducting computer-simulated activities. The Student Center is staffed by three teachers and two paraprofessionals. Two of the teachers are certified in special education. Also, one of the paraprofessionals who works half-time is a special education aide. Ms. DiReeze testified that the staff does not "pull out" special ed students for instruction; rather they go into the regular ed classrooms and work with the special needs students in their regular classes. It appears that the East Hills special ed students are principally learning disabled ("LD") students (e.g., students diagnosed with dyslexia, developmental aphasia, or minimal brain disfunction), not mentally impaired students. However, because Bloomfield Hills does have a small population of mentally impaired middle-school-aged students whose needs cannot be met in the Student Center concept, the District created a basic special education classroom at one middle school, West Hills. When that basic program was established, the entire general education staff of West Hills went through extensive training so that mainstreaming of these students could be maximized. [See Hrg. Tr. Vol. I, pp. 13-14.]

It is Mrs. Hudson's disagreement with the April 1994 IEPC that precipitated the administrative proceedings and this judicial review of the administrative hearing officers' decisions. Meanwhile, during the pendency of the administrative proceedings and this judicial action, pursuant to 20 U.S.C. § 1415(e)(3), Emily has remained in the West Hills-East Hills split day placement pursuant to the 1993 IEPC "trial placement".[7]

The Administrative Proceedings

Pursuant to Mrs. Hudson's request, a special education due process hearing was held at the West Hills Middle School over a five-day period in May 1994.[8]

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[7] 20 U.S.C. § 1415(3)(3) provides, in pertinent part:

> During the pendency of any proceedings conducted pursuant to this section, unless the State or local education agency and the parents or guardian otherwise agree, the child shall remain in the current educational placement of such child. . . . until all such proceedings have been completed.

[8] Section 1415(b)(2) provides that if the parents or guardian of a handicapped child disagree with the child's educational placement,

> . . . the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local

Frank J. Wawrzaszek was mutually selected as the hearing officer for this local hearing.

Prior to the commencement of the hearing, pursuant to *Doe v. Defendant No. 1*, 898 F.2d 1186 (6th Cir. 1990) and *Cordrey v. Eukert*, 917 F.2d 1460 (6th Cir. 1990), the hearing officer assigned the burden of proof to Plaintiff to establish that the IEPC's placement of Emily was inappropriate.

Over the course of five days, the hearing officer heard the testimony of Beth Mueller, Emily's special education basic classroom teacher in the Learning Center at West Hills Middle School; Sharon DiReeze, the Student Center coordinator at East Hills Middle School; Janet Tack, the paraprofessional who worked one-on-one with Emily while she attended regular education science and social studies classes at East Hills; Janette Gwinn, the Principal of West Hills Middle School; Donald Hillman, the Principal of East Hills Middle School; Dr. William Filiatreau, Bloomfield Hills' Director of Special Education; Wendy Lane, the school social worker at West Hills; Jeffrey Holbrook, a general education at-risk resource teacher with the Bloomfield Hills Schools; Timothy Kelly, Emily's softball coach; Sharon Hudson, Emily's mother; Emily Hudson; Dr. Gerald Freeman,

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> educational agency or intermediate educational unit, as determined by State law or by the State educational agency.

Mich. Admin. Code R340.1724 (1987) provides for a local hearing.

Ph.D., a Human Development and Child Studies professor at Oakland University who testified as an expert in special education placement on behalf of the School District; and Thomas Osbeck of the Wayne State University Developmental Disabilities Institute and Dr. David Winstrom, Ph.D., a psychologist with Lakeshore Therapeutic Services, who testified as experts on behalf of Plaintiff. The LHO also received into evidence numerous exhibits.

Beth Mueller, the teacher of the cross-categorical special education basic classroom at West Hills Middle School testified that while West Hills and East Hills have Student Center resource rooms that service bilingual students, gifted and talented and LD special education students, only West Hills has a special education basic classroom. That basic classroom services the entire school district, not just those more severely handicapped students who live in the geographic vicinity of West Hills.

Ms. Mueller testified that she has 12 students in the basic classroom: one autistic student, three who are physically impaired ("POHI"), four who are educably mentally impaired, and four who are trainably mentally impaired. She stated that the severity of Emily's disability placed her in the lowest quarter of her class.

Ms. Mueller is assisted in her classroom by one full-time and one half-time paraprofessional. Other professional staff that assist her are "ancillary service" providers: a physical therapist, an occupational therapist, a speech and language therapist, and a social worker. She is also assisted by an autistic consultant and a hearing consultant because one of her students also has a hearing impairment. There are also two general

education staff members at West Hills who have mental impairment certification, one teacher and one counselor. They are involved in the planning of mainstreaming of the students.

The classroom is equipped with ovens, kitchen tools, manipulatives, and textbooks and other materials from the lower grades that allow mentally impaired students to work toward their goals in a concrete manner.

With respect to Emily, goals set by her IEPC included not only improvement of academic performance but also development of some independent living skills (e.g., washing dishes, cooking, etc.)

Among the specific goals of Emily's IEPC was for Emily to learn to tell time to the nearest five minutes, learning to match money equivalents and coin values, and learning to understand when to add, subtract or multiply.

Ms. Mueller testified that while Emily could tell time to the hour and half-hour, and thus may be able to tell that it is 10:00 a.m., she could not associate that fact with the need to go somewhere or do something at 10:00 a.m. With respect to coin values, Ms. Mueller explained that Emily could not add the value of different coins. For example, if she started counting with a dime, she would give all coins the value of ten cents, regardless of whether they were dimes, nickels, quarters or pennies.

Both Ms. Mueller and Sharon DiReeze, the Student Center resource room coordinator at East Hills Middle School, testified that Emily's ability to express herself in writing was very basic. Emily could write her

name, address and phone number; although she could not accurately respond to questions about her address, such as "What State do you live in?" She could not accurately copy information from the blackboard or from a worksheet she was working on. She could not accurately write what her teacher dictated. Thus, among the goals and objectives set by the IEPC was for Emily to learn to dictate into a tape recorder and learning to keyboard ideas into a computer to complete a simple sentence.

The IEPC also noted that Emily did not demonstrate age appropriate conversational skills and had difficulty with peer relationships. Both Ms. Mueller and Ms. DiReeze testified that Emily had a very limited ability to communicate and the communication skills she did exhibit were often maladaptive. For example, when Emily wants someone's attention, she circles around them repeatedly without speaking, or bumps into the person whose attention she wants. She also greets others with the stock phrase, "I like your shirt." The IEP addressed these deficits by setting goals and objectives including: learning to gain attention in the proper way; learning to initiate and respond to conversations with other students; learning to ask for help; and learning to respect others' personal space.

Ms. DiReeze and Janet Tack, the paraprofessional who worked with Emily one-on-one in her mainstreamed East Hills classes, [9] testified that Emily was simply

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[9] Although she is working in the Bloomfield Hills schools as a part-time paraprofessional, Ms. Tack is a certified teacher.

incapable of benefitting from middle school instruction. Because of her mental impairment, she could not do middle school math, reading or science. Just the language used in classes at the 6th, 7th, 8th grade levels is beyond Emily's comprehension.

With respect to social and emotional goals, Ms. DiReeze and Ms. Tack both testified that Emily made little or no progress toward these goals at East Hills. They, in fact, testified that the East Hills placement may be doing more harm than good because the only person that Emily really would talk to was Ms. Tack since she was the one who worked with her every day. When the staff agreed that an attempt should be made to put a little distance between Ms. Tack and Emily, Emily would rebel by slamming her book shut or by fidgeting with the pages to draw Tack's attention.

Dr. Gerald Freeman, a special education professor at Oakland University and former Director of Special Education of the Oakland County Intermediate School District, also testified concerning his opinion about Emily's educational placement. Prior to the local hearing, Dr. Freeman spent several days observing Emily in her split East Hills/West Hills program. He also spoke with her teachers and paraprofessionals and reviewed school records.

Dr. Freeman's opinion was that

> . . . from an educational standpoint, the overriding objective with Emily should be to attempt to enable her to be as independent a young woman as she possibly can be, and [therefore] her curriculum should

> reflect heavily on the development of those skills which will lead to such independence.
>
> Now, I'm concerned about her being capable of taking care of herself, her being capable of taking care of her environment, her being capable of knowing how to be safe, her ability to get around a community, to engage in what special education generally is called activities of daily living, those kinds of things.

[Hrg. Tr. Vol. III, pp. 547-48.]

Dr. Freeman testified that Emily was developing these "independent living" skills in Ms. Mueller's basic class. He further testified that Emily was not developing these skills or otherwise benefiting academically from her placement in the regular education academic classes at East Hills because the subject matter was far beyond her intellectual ability. "There's such a big gap curricularly," he explained. [Hrg. Tr. Vol. III, p. 614.] He elaborated:

> My main concern is that in observing her [at East Hills], I could not derive what benefits, educationally she was deriving from being placed in that situation.
>
> I saw a lack of involvement in the activities, an isolation within a regular classroom, basically, and I kept asking myself the question, what is this child supposed to be getting out of this situation, . . . why isn't this child's time being used in ways that would, to my way of thinking, leave more to

> what an educational program for her should be.

[Hrg. Tr. Vol. III, pp. 607-608.]

Emily's mother, Sharon Hudson, however, testified that she wanted Emily in regular 7th grade academic classes, and not in the special education basic classroom, at all. She testified that she believed that the independent living goals in Emily's IEPC were inappropriate. When asked by the Hearing Officer what kind of program she wanted for Emily she stated:

> What kind of pros-am [I want] is an academic based program. I don't find that -- I think that a lot of the goals we wrote into Emily's IEPC are very appropriate kinds of goals, but I don't think they should take place without being firmly rooted in academic, and I don't think it's fair to pull the plug on Emily's future by saying that it's not appropriate for her to have science and social studies and composition and all those kinds of things that might be typical for a seventh grade student.
>
> I think none of us knows the extent to which Emily can achieve, and I think it is patently unfair to say that she doesn't need that kind of stuff because she's only going to be doing something menial, and therefore we should concentrate on preparing her for existing in a menial world. That's not how I see the value of education for Emily.

> I want her to have seventh grade subjects. . . and, I'd like her placement to be in her neighborhood school with the kids she lives with, plays with, goes to church with.

[Hrg. Tr. Vol. IV, pp. 842-843.]

The LRO voiced his concern about an "osmosis" method of Emily "picking up" what bits and pieces she's capable of understanding from a general education placement such as Mrs. Hudson's preferred placement:

> [O]f course, we're only talking about next year, we're talking about seventh grade, maybe this is absurd, but does she go to a calculus class, does she go to other [classes] just to pick up whatever is related or understood by her in that class.
>
> These are things that bother me, because as I pointed out to Mr. Hakola. . . the education law calls for development in the cognitive, the affective, the psychomotor and other areas besides socialization, and that's one of the things that I need to be convinced about. I need to be convinced that the education law is used to provide education per se and in a method other than osmosis, just pick anything up that you're capable of picking up. . .
>
> * * *
>
> [A]s a person who has to make a decision on an educational program and the appropriateness of an IEPC, I need to know

> those kinds of things, because very frankly, I don't think -hat, just to put a person in a classroom without specific information geared to her intellect, reading ability and so forth, and as I looked at the records, it was, what, 1.6 reading level. . . but what happens when you get to a higher level and when you get to grades that are junior high and high school grades, where basic subjects are no longer taught, when you're no longer dealing with the basics of math or things of that kind?

[Hrg. Tr. Vol. IV, pp. 845-46.]

Although Mrs. Hudson acknowledged that a calculus "probably would not be the kind of math she's going to be needing to do in her life." she still resisted,

> . . . I feel like Emily is penalized to some extent by the unwillingness of individuals to kind of push her as far as she could go. . .
>
> Emily has a very inquiring mind. . . . I don't know any reason why we should not encourage and push [her] interests and desires just as far as they can possibly be carried out.

[Hrg. Tr. Vol. IV, pp. 846-47.]

Mr. Osbeck of the Developmental Disabilities Institute testified on behalf of Plaintiff in support of Mrs. Hudson's preference for placement of Emily in the general education program at East Hills. However, when

asked if he had ever recommended that a developmentally disabled student not be placed in a regular education class with the regular education teacher being responsible for the student's education, he stated, "In the cases that I testified, I don't recall any time that I've recommended against it." [Hrg. Tr. Vol. V, p. 972.]

Dr. David Winstrom, a neuropsychologist, also testified in support of Mrs. Hudson's position. His testimony was based upon a 20-minute observation of Emily at West Hills, a visit to the East Hills regular classes, and neuropsychological testing of Emily that he performed at the Hudson's home. Although he stated that he felt Emily should be educated in her "home school", he admitted that he is not trained as a school psychologist and is not certified to serve in that capacity. [Hrg. Tr. Vol. V, p. 1067.]

Neither Dr. Winston nor Mr. Osbeck disputed the facts to which the School District's witnesses testified.

After hearing the testimony of all of the witnesses and receiving fifty lengthy exhibits into evidence, including records of testing of Emily and copies of the work she had done while in the split West Hills/East Hills placement, the LHO permitted the parties to submit post-hearing briefs. Two months later, on July 27, 1994, the LHO issued his 13-page findings and decision.

The LHO noted that while Emily has many positive social characteristics, "she has cognitive limitations which call for a level of special education assistance not currently available at EHMS." He found that the Plaintiff did not meet the burden of establishing that the

placement of Emily in West Hills full-time pursuant to the April 1994 IEPC was inappropriate. [LHO Decision, p 10.] He explained:

> There has not been a single witness who has provided convincing evidence in support of petitioner's position that a program in the home school (EHMS) with increased involvement in regular education 7th grade academic classes and decreased placement in special education services, will meet Emily's current educational needs.
>
> In contrast, respondent BHPS district counsel has presented witnesses who have worked with Emily and have observed her progress and problems for a full year. District witnesses have worked in both settings. They have shown that Emily's specific goals and objectives need to be addressed in a combination of basic classroom/appropriate regular class placement. LHO believes that the preponderance of evidence supports full-time placement at WHMS.
>
> * * *
>
> The record shows that the BHPS are committed to the inclusion of handicapped students in regular education. Dr. Filiatreau has testified that 95% of the 656 BHPS "handicapped" students are mainstreamed to the degree appropriate for their ability.

> Even with Emily's academic shortcomings, her proposed participation in regular education is still approximately one-half of each school day. The record has repeatedly shown that Emily could not participate in regular education, take similar tests and achieve at a level comparable to other 7th grade students. . . . During the trial placement Emily was provided with a personal aide who presented a parallel instructional program. The materials were different, the tests were different and Emily's achievement in academics was minimal, at best.
>
> In the opinion of the LHO, short of adding a [special education basic classroom] Learning Center for Emily at EHMS, no amount of supplementary aides and services would meet Emily's current needs. The costs involved in the replication of programs solely for placing Emily in her home school cannot be justified.[10]

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[10] Dr. Filiatreau has submitted to the Court an Affidavit in support of the School District's position stating that it would cost approximately $35,000 to replicate the services available at west Hills at East Hills. [See Affidavit attached to Defendant's Summary Judgment Brief.] Plaintiff contends that the Court should not consider this Affidavit since it was not submitted in the Administrative Proceedings. Plaintiff is mistaken. IDEA's appeal provisions, in fact, explicitly provide for the Court to receive additional evidence. *See 20 U.S.C. §*

[LHO Decision, pp. 10-12.]

> Thus, the LHO determined:
>
> > In the opinion of the hearing officer, the most appropriate public education for Emily Hudson can be provided at the West Hills Middle School. The availability of the basic classroom and the potential for improved coordination of services while Emily is in a regular classroom favors the WHMS placement. The LHO does not believe that a continued involvement in a two school setting can be supported or justified.

[LHO Decision, p. 3.]

Mrs. Hudson was not satisfied with the findings and decision of the local hearing officer and, therefore, pursuant to 20 U.S.C. § 1415(c) and Mich. Admin. Code R340.1725, appealed to the Michigan State Department of Education. [11] Dr. William Sosnowsky was appointed

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1415(e)(2). The Sixth Circuit has construed Section 1415's "additional evidence clause" as vesting discretion in the district court to determine under the facts of each case whether additional evidence is warranted. *See Nashville and Davidson County Metropolitan Government v. Cook,* 915 F. 2d 232 234-235 (6th Cir. 1990).

[11] 20 U.S.C. § 1415(e) provides:

If the [due process] hearing ... is conducted by a local educational agency ..., any party aggrieved by the

findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of said review.

Mich. Admin. Code R340.1725 provides, in pertinent part:

(1) Any party who is aggrieved by the findings and the decision of a hearing conducted pursuant to the provisions of R340.1724 may appeal to the department within 25 calendar days of receipt of the decision for a state review ...

(2) If there is an appeal, the department shall conduct an impartial review of the hearing. The official who conducts the review shall do all of the following:

(a) Examine the entire hearing record, which shall be provided to the state by the public agency in written verbatim form.

(b) Ensure that the procedures at the hearing were consistent with the requirements of due process.

(c) Seek additional evidence if necessary ...

(d) Afford the parties an opportunity for oral or written argument, or both, at the discretion of the reviewing official.

(e) Make an independent decision on completion of the review. The reviewing officer may affirm, reverse, or

the State-level hearing officer ("SHO"). The issues raised on appeal were (1) whether the LHO had correctly placed the burden of proof of inappropriateness of Emily's placement on Mrs. Hudson, and (2) whether the April 1994 IEP was appropriate for Emily.

The-State hearing officer's decision reveals that he reviewed and-considered all of the evidence presented in the local hearing, and after completing that review, on September 13, 1994, he affirmed the LHO's decision in all respects.

With respect to the "burden of proof" issue, the SHO found that the burden of proof was properly assigned to Mrs. Hudson because she "challenged the IEP, and requested a hearing before the IEP was completed" and because he found that the school district had complied "directly and by presumption, with all procedural requirements that sufficiently enabled [Mrs. Hudson] involvement and participation [in the IEP.]" He further noted that "[a]ll information was actually known to the parties." [See SHO Decision, P. 4.]

The SHO also found in favor of the school district on the second appeal issue, i.e., whether the IEP, upheld by the LHO, was appropriate to meet Emily Hudson's needs. The SHO explained:

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modify the decision of the hearing officer or may remand the matter to the hearing officer for further proceedings ....

1. All of Emily's teachers, and her assisting paraprofessional support her placement in a basic classroom setting.

2. The extremely limited educational development, nominal at best, made by Emily is attained only by the confluence of radical, concrete and repetitive, intervention of her basic classroom instruction, constant and complete supervision, direction, and assistance by a paraprofessional, social work, a protective barrier of a "circle of friends", a skillfully and carefully planned parallel curriculum that only vaguely resembles that of her regular grade classmates.

3. Emily is totally dependent upon all of the above resources, and essentially has none of her own that can be developed other than by intensive training. Thus, the importance of the learning center (basic classroom): a full-time special education teacher, a half-time paraprofessional aide, special aids, materials, and equipment, all facilitative to the concrete methods and techniques that are most appropriate to Emily's unique needs.

4. She remains naively responsive and vulnerable to a certain segment of unscrupulous classmates who tease, taunt, and ridicule her. Mr. Osbeck's description of Emily is most fitting: ". . an island in the mainstream."

> 5. She is disruptive to others and distractible to herself. The assigned paraprofessional, nearly always in close proximity to Emily, attenuates, but cannot extinguish, these behaviors. Both of these general behaviors would best be accommodated and modifiable in the proposed basic classroom.
>
> 6. Emily is nearly 13-years-old with a mental age of 5 years-and-4-months. A regular 7th grade comprises, in general, children 12-years of age, with, assuming only average IQS, mental ages of 12-years: A variance of about six years, or more graphically, a 1st grader in the 7th grade. Samples of her work confirm this portrayal.

[State Decision, p. 6.]

Thus, the SHO concluded,

> 1. EMILY HUDSON meets the definition of TRAINABLE MENTALLY IMPAIRED in accordance with Michigan administrative rule R340.1704. This finding is not disputed.
>
> 2. MISS HUDSON needs special education and related services. These are best accomplished in the West Hills Middle Schools in the Bloomfield Hills school district.

> 3. The extent of service required to meet her unique needs [is] specified in the IEP of 4-14-94 (as amended) and as otherwise specified in the decision of the LHO.

[State Decision, p. 7.]

Dissatisfied with the State official's decision affirming the LHO, Mrs. Hudson filed this lawsuit. The Complaint originally alleged four counts arising under IDEA (Counts I and III), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Count II), and the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* (Count IV). Plaintiff stipulated to the dismissal of III and IV, leaving only Counts I and II for adjudication.

The parties have completed discovery. The School District deposed Plaintiff's expert Thomas Osbeck, who testified at the due process hearing. Plaintiff deposed various School district teachers and staff members who also testified at the due process hearing. These witnesses did not modify their previous testimony in any significant way.

III. DISCUSSION

A. STANDARDS APPLICABLE TO MOTIONS FOR SUMMARY JUDGMENT

Fed. R. Civ. Pro. 56(c) provides for entry of summary judgment if the record evidence on file shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Construing Rule 56(c), the U.S. Supreme Court explained:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that part will bear the burden of proof.

Celotex Corp. v. *Catrett*, 477 U.S. 317, 322 (1986). *See also, Matsushita Electrical Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson* v. *Liberty Lobby Inc.*, 477 U.S. 242 (1986).

Under the principles enunciated in the above trilogy, the movant must meet the initial burden of showing "the absence of a genuine issue of material fact" as to an essential element of the non-movant's case. This burden may be met by pointing out to the court that the respondent, having had sufficient opportunity for discovery, has no evidence to support an essential element of his or her case. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989). In responding to a summary judgment motion, the respondent cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must "present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Id.* Thus, the respondent must "do more than simply show that there is some metaphysical doubt as to the material facts . . . Where the record taken as a whole could not lead a rational trier of fact to find" for the respondent, the

motion should be granted. Id. The trial court has at least some discretion to determine whether the respondent's claim is plausible. *Id.* at 1480. *See also, Nernberg v. Pearce*, 35 F.3d 247, 249 (6th Cir. 1994).

B. APPLICABLE STANDARDS IN IDEA § 1415 ACTIONS

(1) Standard of Review to be Applied by the Court

Subsection (e) of § 1415 of the IDEA provides, in pertinent part:

> In any action [challenging the administrative findings and decisions of the local and state agencies], the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

20 U.S.C. § 1415(e) (2).

The Supreme Court has held that the provision that a reviewing court "bas[e] its decision on the preponderance of the evidence [and] grant such relief as the court determines is appropriate"

> is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review. . . .The fact that § 1415(e) requires that the reviewing

> court "receive the records of the [state] administrative proceedings" carries with it the implied requirement that due weight shall be given to these proceedings.

Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034, 3051, 73 L.Ed.2d 690 (1982).

Based on *Rowley*, the Sixth Circuit has held that in IDEA cases, district courts are required to perform a *de novo* review, but must "give due weight to the state administrative proceedings in reaching its decision." *Roncker v. Walter,* 700 F.2d 1058, 1062 (6th Cir. 1982), *cert. denied*, 464 U.S. 864 (1983). More recent cases describe this standard as a "modified *de novo* review. *See e.g., Doe v. Board of Education*, 9 F.3d 455, 458 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 2104 (1994).

As the court observed in *Doe v. Smith*, 879 F.2d 1340 (6th Cir.1989), this deferential standard of review makes sense because "federal courts are generalists with no experience in the educational needs of handicapped children and will benefit from the fact finding of a state agency with expertise in the field." *Id.* at 1343. *See also, Thomas v. Cincinnati Board of Education*, 918 F.2d 618, 624 (6th Cir. 1990). Failure of a district court to give the state proceedings due weight constitutes reversible error. *See Gilette v. Fairland Board of Education*, 932 F.2d 551, 555 (6th Cir. 1991).

2. Burden of Proof

The burden of proof in an appeal from a disputed IEP falls on the party challenging the IEP. *Cordrey v. Eukert*, 917 F.2d 1460, 1469 (6th Cir. 1990)., 9 F. 3d

455, 458 (6th Cir. 1993), *cert. denied*, 114 S.Ct. 2104 (1994); *Doe v. Defendant* I, 898 F.2d 1186, 1191 (6th Cir. 1990). Thus, in this case, Plaintiff bears the burden of proving that the disputed IEP placing Emily Hudson in West Hills Middle School all day is inappropriate.

C. PLAINTIFF HAS NOT ESTABLISHED THAT THE CHALLENGED IEP IN THIS CASE IS INAPPROPRIATE

Plaintiff claims that Emily Hudson's IEP is inappropriate because she contends that IDEA's "least restrictive environment" ("LRE") provisions require that Emily be placed at her "home school", i.e., the school she would attend if she were not handicapped. Since Emily would attend the middle school closest to her home if she were not handicapped and that closest school is East Hills Middle School, Plaintiff contends that the statute and attendant regulations mandate that she be placed in that school.

IDEA does not use the phrase "home school" or speak to the proximity of a placement to a child's home. Rather, the "least restrictive environment" provision states only that schools must establish procedures to assure that

> to the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in

regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. .

20 U.S.C. § 1432(5)(B) (emphasis added).

IDEA's regulations interpreting Section 1412(5)(B) do use the word "home", but not in the narrow sense argued by Plaintiff. 34 C.F.R. § 300.552 provides:

> Each public agency shall ensure that:
>
> (a) The educational placement of each child with a disability --
>
> (1) Is determined at least annually;
> (2) Is based on his or her IEP; and
> (3) Is as close as possible to a child's home.
>
> (b) The various alternative placements included at § 300.551 [instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions] are available to the extent necessary to implement the IEP for each child with a disability.
>
> (c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.
>
> (d) In selecting the LRE [least restrictive environment], consideration is seven to any

> potential harmful effect on the child or on the quality of services that he or she needs.

34 C.F.R. § 300.552 (emphasis added).

Moreover, the official Department of Education Note following this regulation makes clear that placements are not etched in stone, but rather are to be made based on each individual child's needs:

> Section 300.552 includes some of the main factors that must be considered in determining the extent to which a child with a disability can be educated with children who are nondisabled. The overriding rule in this section is that placement decisions must be made on an individual basis. The section also requires each agency to have various alternative placements available to ensure that each child with a disability receives an education which is appropriate to his or her individual needs.

As the Sixth Circuit observed in *Roncker, supra*, in a case involving the placement of child who, like Emily Hudson, had an IQ of less than 50 and was classified by as trainable mentally impaired, the proper focus in each case is the "benefit' to the handicapped child. Focusing on the benefit to the child, the *Roncker* court noted that mainstreamed education is not always appropriate for a handicapped- child, and explained that mainstreaming would not be appropriate

> if the disabled student would not benefit from the mainstreaming; or

> if any marginal benefit from mainstreaming would be outweighed by the benefits gained from services that could not feasibly be provided in the non-segregated setting; or
>
> if the disabled student would be a disruptive force in the mainstreamed setting.

700 F.2d at 1063.[12]

The *Roncker* "benefit-to-the-disabled-child" test has been adopted by the Fourth and Eighth Circuits. *See, A.W. v. Northwest R-1 School District*, 813 F.2d 158, 163 (1987), *cert. denied,* 484 U.S. 847 (1987); *Barnett v. Fairfax County School Board*, 927 F.2d 46 (4th Cir. 1991). *cert. denied*, 502 U.S. 859 (1991).[13]

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[12] The *Roncker* court also determined that cost is another proper factor to consider in determining the appropriateness of a handicapped child's placement. *Id.*

[13] Plaintiff does not dispute that the *Roncker* benefit analysis is the accepted test in this Circuit. Instead, relying on case law from the Third, Fifth and Eleventh Circuit criticizing *Plaintiff* asks his Court to disregard Sixth Circuit precedent and adopt an alternative test focusing on whether the child can "achieve satisfactorily" in regular education with the assistance of supplementary aids and services.

In *Barnett, supra,* the parents of a handicapped child contested the child's IEP placement at a school that was, like Emily Hudson' n West Hills placement, five miles farther from his home than his "home school". The Fourth Circuit rejected the parents' contention that 34 C.F.R. § 300.352 required placement at the child's "home school":

> [W]e do not interpret this section [34 C.F.R. § 300.552] as imposing upon a school board the obligation to place a child in his base school. Rather, this section requires only that a school board take into account, as one factor, the geographical proximity of the placement in making these decisions. .

927 F.2d at 153. *See also, Fischer v. Rochester Community Schools,* 780 F. Supp. 1142, 1150 (E.D. Mich. 1991), in which the court noted the lack of merit in the plaintiff-parents argument that their handicapped child was entitled to all appropriate services at the "home school" explaining, "[W]e are taught by *Barnett v. Fairfax County School Board, supra,* that . . . there is no such entitlement. "

Similarly, in *Schuldt v. Mankato School District No. 77,* 937 F.2d 1357 (8th Cir. 3991), *cert. denied,* 112 U.S. 937 (1992), the Eighth Circuit stated:

> The [plaintiffs] argue that the act [IDEA] requires the school district to place Erika at the school nearest to her home. Their argument misinterprets the act [and] misuses precedent. .

> We interpret section 300.552 as directing the school district to locate Erika at a school where her teachers can fully implement her program. The phrase "as close as possible" is not a mandate that the school district place Erika at [her home school.]

Id. at 1361.

Recently, the Tenth Circuit addressed this "home school" issue in *Murray v. Montrose County School District RE-1J*, 51 F.3d 921 (l0th Cir. 1995), a case which factually is strikingly similar to the instant action. *Murray* concerned a child with cerebral palsy who had initially attended his "home school". An IEPC was conducted and it was determined that the child would be more appropriately placed at another elementary school, which like West Hills Middle School in our case, had a specific program for severely disabled students. This school, however, was ten miles from the student's home. The child's parents requested a due process hearing to contest the placement. At the hearing, they contended that the LRE provisions of IDEA required the school district to educate their child at his home school. The administrative proceedings were concluded in the school district's favor, and in the parents' subsequent appeal to the federal district court, the district court granted the school district's motion for summary judgment.

On appeal to the Tenth Circuit Court of Appeals, the Murrays argued, just as Plaintiff here argues, that the IDEA's LRE provisions and its regulations and legislative history gave rise to a strong presumption that the LRE

was at the student's "neighborhood", i.e., "home" school. The Court of Appeals rejected that argument:

> The Murrays. . . argue that the two implementing regulations make express what the statute merely implies. 34 C.F.R. § 300.552 a) (3) provides that "[t]he educational placement of each child with a disability [shall be] as close as possible to the child's home.~' 34 C.F.R. § 300,.552(c) provides that state agencies must ensure that "[u]nless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled." The Murrays assert that these two regulations create a presumption that the LRE is in the neighborhood school.
>
> We disagree. A natural and logical reading of these two regulations is that a disabled child should be educated in the school he or she would attend if not disabled (i.e., the neighborhood school), *unless* the child's IEP requires placement elsewhere. If the IEP requires placement elsewhere, then, in deciding where the appropriate placement is, geographical proximity to home is relevant, and the child should be placed as close to home as possible.

Id. at 929.

This Court agrees with these interpretations of the IDEA statute and regulations. Contrary to Plaintiff's

contentions, nothing in the statute or regulations requires a school district to in every instance place a child in the neighborhood school that he/she would attend if not handicapped. As the Tenth Circuit observed in *Murray*, a natural and logical reading of the statute and regulations is that education in the neighborhood school is identified in the IEP preferred unless the child's needs as requires placement elsewhere. It is at the point where placement is required elsewhere that a school district must place the child in such an alternate placement "as close to home as possible." The Bloomfield Hills School District has complied with this requisite.

Emily Hudson's IEP requires placement in a Learning Center with mainstreaming in unified arts classes. Bloomfield Hills has only one special education "Learning Center" basic classroom and that basic classroom is at West Hills Middle School.

Plaintiff nonetheless argues that the Court should reverse the findings and conclusions of the State and local hearing officers and find that Emily's IEP requiring placing her in a special education basic classroom for any part of the day is inappropriate. She claims that Emily can "achieve satisfactorily" in all regular middle school academic subjects, and therefore should be placed full-time in the general education program -- with "an hour or two" daily "intensive" assistance -- rendering placement at East Hills appropriate. The preponderance of the evidence, however, does not support Mrs. Hudson's claim that Emily can "achieve satisfactorily" in regular education classes.

To accept Plaintiff's argument, the Court would have to ignore the extensive record of the administrative

proceedings and the great weight of the evidence presented in those administrative proceedings establishing that Emily was not developing any needed independent living skills or otherwise benefiting academically from her placement in the regular education academic classes at East Hills because the subject matter was far beyond her intellectual ability.

All of Emily's teachers and paraprofessionals testified that Emily needed to be in the spec al education basic classroom. The evidence presented in the administrative proceedings established that Emily could not participate in regular education, take similar tests and achieve at a level comparable to other 7th grade students. During the "trial East Hills half-day placement, Emily did not do seventh grade work. Nor did she participate instruction with the regular seventh grade classroom teacher or her classmates. Rather, she worked in isolation and was provided with a personal aide upon whom she became almost completely dependent, who presented to Emily a separate first-or second-grade level instructional program with materials that were completely different from those the regular seventh graders worked on. The tests Emily was given were different from the regular seventh graders and her achievement in academics -- even at the first-grade level -- was minimal, at best.[14]

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[14] At oral argument, quoting from *Doe v. Board of Education of Tullahoma City Schools*, g F.3d 455 (6th Cir. 1993), Plaintiff's counsel argued that even though West Hills might have a program that would be the educational equivalent of a "Cadillac", the statute does not require that Emily be provided with a Cadillac

when a Chevy" would serve the purpose. Plaintiff's reliance on *Tullahoma* is wholly misplaced for that case involved a factual situation that was entirely the reverse of that presented in this case. In the *Tullahoma* case, the parents of a learning disabled student did not want their child mainstreamed in the public school system at all and enrolled him in a private school specializing in learning disabilities. They then sought to require the school district to pay the private school tuition. The court refused to order the school system to pay the private school tuition because it found that the least restrictive environment which would benefit the child was the mainstream curriculum in the public school system with the provision of ancillary special services in the public school as recommended in the IEP. It was in this context that the Court of Appeals made its "Cadillac vs. Chevy" statement:

> The Act requires that the Tullahoma schools provide the educational equivalent of a serviceable Chevrolet to every handicapped student. Appellant, however, demands that the Tullahoma school system provide a Cadillac solely for appellant's use. We suspect that the Chevrolet offered to appellant is in fact a much nicer model than that offered to the average Tullahoma student.
>
> Be that as it may, we hold that the Board is not required to provide a Cadillac and that the proposed IEP is reasonably calculated to provided educational benefits to

Based on the record presented to the Court in this case, and giving due deference to the determinations of the hearing officers and the educators who testified at the local hearing, whose expertise in the field of special education the Court cannot ignore, the Court finds that the preponderance of the evidence in this case supports the IEPC's placement of Emily at West Hills full-time, to be educated in the basic special education classroom part-time and mainstreamed at that school in unified arts classes the rest of the day.[15]

> appellant, and is therefore in compliance with the requirements of the IDEA.

9 F.3d at 459-460.

Thus, the *Tullahoma* court clearly did not hold, as Plaintiff suggests, that where both a "Chevy and a Cadillac" were available, courts had to place the child in the the home school if that school was the one which offered the Chevy. Rather, the court simply held that the school was not required to offer a "Cadillac" program. The Court notes, however, that in this case, the West Hills Middle School appears to be a Cadillac, while, with respect to Emily's needs, the East Hills school program appears to be something less than a "serviceable Chevy."

[15] To the extent that Plaintiff has continuously argued that this is a case in which the school district has violated the "mainstreaming requirements of IDEA, the record makes clear that this contention is wholly without merit. While mainstreaming is required under the statute,

Plaintiff has not come forward with convincing evidence to support her contention that a program in Emily's neighborhood school, East Hills, with the increased involvement Mrs. Hudson wants her daughter to have in regular education 7th grade academic classes and decreased placement in special education services, will meet Emily's current educational needs. Given the undisputed record evidence of Emily's mental impairment, short of adding a special education basic classroom Learning Center at East Hills -- something that would be cost-prohibitive for the School District particularly given the small severely handicapped student population of the district -- no amount of supplementary aides and services would meet Emily's current needs.

For these reasons, the Court will grant Defendant's Motion for Summary Judgment on Plaintiff's IDEA claims. Accordingly, Count I of Plaintiff's Complaint will be dismissed. [16]

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nothing in the statute or regulations requires mainstreaming in all classes. All that is required is that the child be mainstreamed "to the maximum extent possible." For Emily, this requisite is clearly satisfied with the recommended mainstreaming in the unified arts (i.e., gym, music, home economics, etc.) classes at West Hills.

[16] Since the hearing on the motions for summary judgment, Plaintiff has filed a motion "to submit additional evidence" contending that the Sixth Circuit's interpretation of the "additional evidence" provision of Section 1415(e)(2) of the IDEA in *Nashville and Davidson County Metropolitan Government v. Cook*, 915 F.2d 232

(6th Cir. 1990), requires the Court to conduct evidentiary hearing upon Plaintiff's request to hear additional expert testimony from the same experts who testified in the administrative proceedings regarding the benefits of lesser restrictive environments than the West Hills program and a placement of Emily in East Hills. Plaintiff misreads the *Nashville* case. In *Nashville,* the Sixth Circuit held that it was appropriate for the District Court to hear additional evidence concerning less restrictive placements for the plaintiff because "the [administrative] hearing officer failed to consider the statutorily least restrictive alternative requirement [and failed] to consider less restrictive placements. *Id. at 235.* This is not the case in the instant action.

In this case, the administrative record makes clear that both the local hearing officer and the state officer considered at length the pros and cons of the East Hills placement that Mrs. Hudson wanted for her daughter. There is nothing in the record of this case that resembles the absence of consideration given to alternative placements in the *Nashville* case. Moreover, the *Nashville* case makes clear that the Sixth Circuit views the matter of additional evidence to be one that rests in the sound discretion of the district court. *See* discussion at 915 F. 2d at 234-235.

Here, all discovery in the case has closed and the motion deadline has passed. Given the extensive administrative record and discovery in this litigation, the Court finds no reason to take additional evidence.

For these reasons, the Court will DENY Plaintiff's Motion

D. PLAINTIFF'S REHABILITATION ACT CLAIMS WILL ALSO BE DISMISSED.

Count II of Plaintiff's Complaint alleges that, in addition to the Count I allegations of violation of IDEA, the placement of Emily at West Hills violates the least restrictive environment provisions of Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, and the attendant implementing regulations, 34 C.F.R. § 104.31 *et seq.*

Section 504 of the Rehabilitation Act prohibits discrimination on the basis of handicap by agencies receiving federal funds. The pertinent implementing regulations applicable to public schools are as follows:

> **§104.33. Free appropriate public education.**
>
> (a) *General.* A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.
>
> (b) *Appropriate education.* (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (I) are designed to

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to Submit Additional Evidence.

> meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34 [least restrictive environment], 104.35 [testing and evaluation], and 104.35 [procedural safeguards].
>
> (2) Implementation of an individualized education program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b) (1) (I).

34 C.F.R. § 104.33 (emphasis added).

With respect to "least restrictive environment", as Plaintiff acknowledged in her Complaint, Section 504's least restrictive environment regulations "mirror" the IDEA regulations. In pertinent part, these regulations provide as follows:

> (a) *Academic setting.* A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to meet the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated

> by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a recipient places a person in a setting other than the regular educational environment pursuant to this paragraph, it shall take into account the proximity of the alternate setting to the person's home.

34 C.F.R. § 104.34 (emphasis added).

Plaintiff has did not address her Count II allegations of violation of the least restrictive environment provisions of Section 504 in any of her summary judgment briefs or at oral argument, nor has she responded to Defendant's arguments for dismissal of Count II. Therefore, the Court may assume that Plaintiff is no longer pursuing her Section 504 claim.

Assuming, however, that Plaintiff still is pursuing her § 504 claim, as set forth *supra*, in Section B of this Opinion, the Court has determined that the School District has established by a preponderance of the evidence that Emily cannot be educated satisfactorily in the general education middle school program at East Hills Middle School and that her needs can best be met by a placement at West Hills as recommended by the IEPC. For this reason, the Court finds that Plaintiff has not established a violation of Section 504 or its least restrictive environment regulations. Therefore, summary

judgment will be granted in favor of the Defendant on this claim, as well. [17]

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[17] Moreover, as pointed out by Defendant, Plaintiff did not allege any Section 504 violation at either the local-level or the state-level of the administrative proceedings. As Defendant points out, special education litigants are not entitled to relief under Section 504 unless they first initiate and exhaust all available administrative remedies. Section 1415(f) of IDEA, provides:

(f) Effect on other laws.

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973 [Section 504] or other Federal statutes protecting the rights of children and youth with disabilities, *except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter [IDEA], the procedures under subsections (b) (2) and (c) [providing for a local hearing determination and review by state agency] of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.*

20 U.S.C. § 3415(f) (emphasis added).

Since Plaintiff did not exhaust her administrative

IV. CONCLUSION

For all of the reasons set forth in this Opinion and Order,

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment is hereby GRANTED and Plaintiff's Motion for Summary Judgment is hereby DENIED.

IT IS FURTHER ORDERED that Defendant's Motion to Submit Additional Evidence is DENIED.

Accordingly, this case is hereby DISMISSED in its entirety, with prejudice.

/s/ Gerald R. Rosen
United States District Judge

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remedies with respect to her Section 504 claim, even if there were some merit to that claim, dismissal of Count II in this action would nonetheless be required.

APPENDIX C

CASE # H-0276-94

STATE LEVEL HEARING REVIEW DECISION

IN THE MATTER OF

EMILY HUDSON v BLOOMFIELD HILLS PUBLIC SCHOOLS

William P. Sosnowsky
State Hearing Review Officer

THE GRAVAMEN IN THIS APPEAL IS TWOFOLD: 1) WAS THE BURDEN OF PROOF PROPERLY PLACED UPON PETITIONER PARENT WHO REQUESTED A HEARING BEFORE THE IEP WAS COMPLETED (HO exhibits 1 and 2; and throughout the transcript)?, AND 2) IS THE IEP OF 4-14-94 AS AMENDED AND ADDED TO, AND UPHELD BY THE LOCAL HEARING OFFICER (LHO Decision, p. 12, 13), APPROPRIATE TO THE NEEDS OF EMILY HUDSON?

I. BACKGROUND INFORMATION:

EMILY HUDSON (B.D. 9-25-1981), a female aged l2-years-ll-months, resides in the Bloomfield Hills Public Schools district (Oakland Schools ISD). The latest derived IQ is 42, indicating a mental age of 5-years and 4-months.

She was first enrolled in the Pontiac school district special education PPI program in 1985, and later, determined TMI, was placed in a TMI program (from 1988 to 1991) there.-Her present categorical determination remains trainable mentally impaired (TMI) (R340. 1704). In May, 1991, redetermined as TMI, she was placed in a cross-categorical classroom in a Bloomfield Hills special education program for school years 1991-92 and 1992-93.

On 5-17-1993-an IEPC convened in which Petitioner parent had the opportunity to participate fully and meaningfully in the development of the Emily's IEP (Respondent exhibit 3). Petitioner disagreed with the IEP, requested mediation (5-26-93), after which, it having failed to resolve the issues, she requested a hearing.

At the hearing officer's suggestion the parties agreed to postpone the hearing and stipulated to a trial program for the 1993-94 school year as follows: 10 hours 50 minutes a week

in a special education basic classroom at West Hills Middle School (WHMS), and 19 hours and 10 minutes in regular education at East Hills Middle School (EHMS). The program consisted of the following elements: 1) Transportation (6 miles) to WHMS daily each morning; 2) Assignment to a cross-categorical basic classroom program (called "learning center" by the district) from 8:30 a.m. to 10:40 a.m.; 3) Related services consisting of school social work and speech and language in conjunction with the basic program; 4) Transportation to EHMS where, from 10:40 to the end of the school day, she was provided with a regular education schedule consisting of a luncheon period, recess periods, and classes in science, social studies, home economics, and physical education. In all of the latter, she had a paraprofessional assigned to assist her. Her teacher was Beth Mueller, whose categorical approval is in contention because of a procedural omission, not because of her competence, nor even the area of her approval (EI) (Transcript, pp. 20 and 275, 276, 2/9; Transcript, the hearing officer, p.278). Petitioner parent did not, nor has not objected to teacher Mueller (Transcript Filiatreau, p. -64). Neither party sought nor seeks a continuation of this dual program in two schools.

On 4-14-91 an IEPC developed the disputed IEP for Miss Hudson for the 1994-95 school year. Petitioner parent was present, had the opportunity to participate fully and meaningfully in the development of the IEP (Respondent exhibit 1), and, in addition, was accompanied by an advocate from the Michigan Protection and Advocacy service. Additions to the IEP, stipulated by the parties just prior to the hearing, increased the amount of time each for social work and speech and language therapy to 60 minutes from 30 minutes.

The IEP contains the following elements: 1) Special education basic program (range): 15 hours 30 minutes to 18 hours 30 minutes a week, inclusive of related services, specifically, school social work 60 minutes a week and speech and language service 60 minutes a week (direct and consultative services for each). 2) General education grade) range: reg-ed: 13 hours 45 minutes a week (including gym, home economics, art, drama, and/or choir (HO exhibit 5)). OT consultation 30 minutes a month. In addition, the hearing officer noted that, because the IEP was truncated by the abrupt termination of the IEPC by Petitioner's request for a hearing (Respondent exhibit 1, 10th page; Testimony Mueller, pp. 108-111 and Testimony Gwinn, p.741) Pre-vocational and work study were not addressed by the IEPC as required by Rule R340.1721e (3)(g) (which provides that "beginning at age 12, a statement indicating committee consideration of pre/vocational [and] vocational education needs"). He, therefore, ordered that the "parties should discuss, establish and append those goals to the 4-14-94 IEPC."

Petitioner contends that Emily should attend her home school (EHMS) for the entire school day. She should be placed primarily in regular education classes and pulled-out 1 to 2 hours a day for intensive instruction in the Student Center. Teacher consultant services would be provided to the regular education staff as needed. Related services would include speech and language therapy and social work. [The LHO noted that this proposal would decrease the special education Emily's unique needs require.]

Respondent's position: Miss Hudson's needs would be best met by full-time placement in the basic ("cross-categorical") classroom program at WHMS. Attendance in regular

education would be arranged as appropriate. All as specified in the IEP of 4-14-94 and the amendments thereto.

During the pre-hearing conference (held 5-4-94), again subsequently by letter (HO exhibit 1 and 2), and still again at the hearing, the HO assigned the burden of proof to Petitioner, relying on Doe v Defendant 1 and Cordrey v Euckert. Petitioner objected to this assignment prior to and at the hearing, and made it an issue of appeal.

The "primary purpose of the hearing was to determine an appropriate educational placement for Emily Hudson." (HO decision, paragraph 1, p.1; transcript, Hakola. P. 17).

The hearing was held in 5 sessions open to the public, at the WHMS of the Bloomfield Hills school district. It began on May 19, 1994, continued on May 2nd, 24th, and 26th, and adjourned on 531-94. Post-hearing briefs were submitted.

Petitioners were represented by Attorney Stewart R. Hakola, Esq., Michigan Protection and Advocacy, 315 S. Front, Marquette, MI 49855-4644; Respondent district by Attorney John Gierak, Esq., of Dean and Fulkerson, 801 Big Beaver Road. Troy, MI 48084.

In addition to Emily Hudson and her mother, Petitioners called two expert witnesses, and 5 school personnel witnesses.

Petitioner had one exhibit admitted as a joint exhibit (Transcript, p. 918), otherwise, Petitioner relied on Respondent's exhibits (Transcript, p. 940) as evidentiary mater) al .

Respondent district presented one expert witness and five (5) school personnel witnesses of whom three were, respectively, Emily's two teachers and the paraprofessional who had directly served Emily during the 1993-94 school year. Respondent presented 43 exhibits of which 33 were admitted.

The LHO upheld the IEP as amended (7-27-94). Petitioner appealed the LHO's decision. (Letter dated 8-16-94; MDE appeal form with a 3-page attachment)

II. ISSUES of APPEAL: STATE HEARING REVIEW OFFICER DECISION.

ISSUE #1: Assignment of Burden of Proof to Petitioner.

Decision: Burden of proof was properly assigned to Petitioner.

Rationale:

1) Petitioner challenged the IEP, and requested a hearing even before the IEP was completed.

2) Respondent complied, directly and by presumption, with all procedural requirements that sufficiently enabled Petitioner's involvement and participation. All required information was actually known to the parties.

3) The LHO, repeatedly made aware of the this issue by Petitioner did not modify his ruling on the placement of the burden.

4) Although burden of proof was assigned to Petitioner, Respondent went first.

4) Although burden of proof was assigned to Petitioner, Respondent went first.

5) The LHO upheld the amended IEP in full knowledge that the prospective teacher's categorical approval (EI) does not correspond to Emily's determined category (TMI).

6) Although Petitioner was aware that the otherwise qualified teacher proposed for the basic classroom held approval to teach EI (not MI), Respondent appears not to have complied precisely with an element of Rule R340. ,33(q) regarding the discordance between Emily's eligibility category (TMI) and the proposed placement in a "cross-categorical" program conducted by a teacher approved to teach EI. That element is "parental consent" (defined at R340.1701(l). A rationale is provided on the IEP (Respondent exhibit 1, p.2): "This categorical program meets the needs of the student." Respondent obviously chose not to opt for a hearing. This potential irregularity notwithstanding, the programs and services set forth in the IEP meet Emily's individual needs to the extent required by law based upon the record made in the hearing. (Debut Community School District. 18 IDELR 3311)

7) This issue (the teacher's categorical approval) should have been processed through the compliance procedure (R340.1,01 (e); Part S of the Special Education rules). This is especially pertinent since Petitioner had the opportunity to participate meaningfully in the development of the IEP, and had a skilled advocate from Michigan Advocacy and Protection service to advise her.

8) With Petitioner parent on the stand as a witness, Petitioner's council did not inquire of the witness as to the

matter (Transcript, p. 826-856), but had previously indicated that such he "didn't think it's relevant" (Transcript, p. 773).

9) Petitioner maintained that rule 33(q) requires ("has the duty") to call a hearing if the parent refuses to give consent. A careful reading of the rule shows that it actually says ".... The public agency may [emphasis by SLRO] use the hearing procedures in R340.1724 to R340.1724b when the parent refuses to provide consent. If the hearing officer upholds the agency, the agency may proceed without the parents' consent, subject to the parents' rights under R340.1725 and R340. 1725a. " Respondent district chose not to request a hearing.

ISSUE #2. Is the amended IEP, upheld by the LHO, appropriate to to meet Emily Hudson's unique needs?

Decision: The LHO's affirmation of the amended IEP of 4-14-94 is upheld.

Rationale: The program, and related services, provided in the amended IEP of 4-14-94 are designed to bring Miss Hudson to her maximum potential.

1. All of Emily's teachers, and her assisting paraprofessional support her placement in a basic classroom setting.

2. The extremely limited educational development, nominal at best, made by Emily is attained only by the confluence of radical, concrete and repetitive, intervention of her basic classroom instruction, constant and complete supervision, direction, and assistance by a paraprofessional, social work, a protective barrier of a "circle of friends", a skillfully and carefully planned parallel curriculum that only vaguely resembles that of her regular grade classmates.

3. Emily is totally dependent upon all of the above resources, and essentially has none of her own that can be developed other than by intensive training. Thus, the importance of the learning center (basic classroom): a full-time special education teacher, a half-time paraprofessional aide, special aids, materials, and equipment, all facilitative to the concrete methods and techniques that are most appropriate to Emily's unique needs. (Transcript, pp.24-44; Respondent exhibit 18)

4. She remains naively responsive and vulnerable to a certain segment of unscrupulous classmates who tease, taunt, and ridicule her. Mr. Osbeck's description of Emily is most fitting: "... an island in the mainstream." (Transcript, p. 911)

5. She is disruptive to others and distractible to herself. The assigned paraprofessional, nearly always in close proximity to Emily, attenuates, but cannot extinguish, these behaviors. Both of these general behaviors would best be accommodated and modifiable in the proposed basic classroom.

6. Emily is nearly 13-years-old with a mental age of 5-years-and 4-months. A regular 7th grade comprises, in general, children 12-years of age, with, assuming only average IQS, mental ages of 12-years: A variance of about six years, or more graphically, a 1st grader in the 7th grade. Samples of her work confirm this portrayal (Respondent's exhibits 20, 23-29, 31, 33, 34, and 36).

7. Petitioner's expert witnesses seemed strained for observations of Emily in an effort to support purported pedagogically sound reasons for having Emily spend most of her day (except for certain "pull-outs") in the regular 7th grade. Dr. Winton admitted that he "read[s] and spell[s] at

the third grade level, and I'm in the top one percent in the world in terms of I.Q. So, I can learn this stuff without reading it? Yeah...." (Transcript, p. 1082). Mr. Osbeck admitted to the query by the hearing officer, had he ever recommended that a student not be included with a regular education teacher being responsible for a student's instruction?, he replied, "in the cases that I testified, I don't recall anytime that I've recommended against it". (Transcript, p. 9,2)

III. FINDINGS OF FACT:

1. EMILY HUDSON meets the definition of TRAINABLE MENTALLY IMPAIRED in accordance with Michigan administrative rule R340. 1704. This finding is not disputed.

2. MISS HUDSON needs special education and related services. These are best accomplished in the West Hills Middle School in the Bloomfield Hills school district

3. The extent of service required to meet her unique needs specified in the IEP of 4-14-94 (as amended) and as otherwise specified in the decision of the LHO.

IV. CONCLUSIONS OF LAW:

1. EMILY HUDSON is handicapped as defined in rules R340.1702 and Section R340.1704 of the Michigan Administrative Code. Therefore, she is eligible for special education programs and related services.

The superintendent of the Bloomfield Hills Public Schools has the responsibility to provide, and shall implement, the special education program and services specified in the IEP of 4-14-94 as amended and added to.

This decision shall be in effect for one calendar year, beginning with the date set forth below, unless appealed or reconsidered under 340.1725a.

This review was conducted pursuant to Michigan administrative rule R340.1725. A party to this matter who may be aggrieved by the findings and decision herein has the right to civil action in a court of competent jurisdiction as provided in rule R340.1725a.

/s/
William P. Sosnowsky
State Level Review Officer
September 13, 1994

APPENDIX D

DECISION

IN THE MATTER OF THE

SPECIAL EDUCATION HEARING

FOR

EMILY HUDSON

vs.

BLOOMFIELD HILLS PUBLIC SCHOOLS

HEARING DATES - MAY 19, 23, 24, 26 AND 31, 1994
HEARING DECISION - JULY 27, 1994

HEARING OFFICER - F. J. WAWRZASZEK

INTRODUCTION:

A special education due process hearing was held at the West Hills Middle School in Bloomfield Hills, Michigan. The hearing was held on May 19, 23, 24, 26 and 31, 1994. The primary purpose of the hearing was to determine an appropriate educational placement for Emily Hudson.

A similar proceeding was scheduled at the beginning of the 1993-94 academic year but was averted when parties stipulated to a trial placement. The trial placement consisted of a combination of regular and special education programming for Emily at both the West Hills and the East Hills Middle Schools. After using the program for a year, it became apparent that if there were any benefits to the dual school placements as utilized during the trial, they were so minimal that neither party recommended that it should be continued.

The most recent Individualized Educational Planning Committee (IEPC) recommended a change in placement for the 1994-95 school year. The District's proposed plan is listed below. Emily's mother, Mrs. Sharon Hudson, disagreed with the recommended placement and requested a due process hearing as provided under R340. 1724 of the Michigan Special Education Rules.

As the hearing commenced, the position of parties was as follows:

PARENT POSITION PRIOR TO HEARING:

Mrs. Hudson did not agree with the findings and

recommendations of the 4/14/94 IEPC. It was her position that Emily should attend her home school, East Hills Middle School, for the entire school day. She should primarily be placed in regular education classes, but could be pulled out of regular education, 1-2 hours per day for intensive instruction in the Student Center. Teacher consultant services should be provided to the regular education staff as needed. Related services of Speech and Language and social work will also be provided at East Hills. Just prior to the hearing, parties stipulated that each of those services would be increased to one hour per week.

SCHOOL DISTRICT POSITION PRIOR TO THE HEARING:

The School District's position was that Emily's educational needs could be best met by a full-time placement at the West Hills Middle School. The program would place Emily in the West Hills Learning Center (the basic special education classroom) and in general education when appropriate. The number of hours in the special education Learning Center, including support services, would range from 15½-18½ hours per week. Time in regular education would range from 11½-14½ hours per week.[1] The ranges include the agreed increases in the areas of speech and language and social work.

BACKGROUND INFORMATION:

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[1] as corrected in fax dated 6/22/94.

Emily Hudson is a 12-year and 10-month old female student who is currently residing in the Bloomfield Hills Public Schools District.

Emily has been receiving special education services since 1985 when she was evaluated through Project Find and found to be eligible for the Early Development Program. In 1988 she was designated as Trainable Mentally Impaired (TMI). At that time she was enrolled in a TMI program in Pontiac and remained in that placement through 1991. (MET Report, Sch. Ex. 2) An IEPC dated 5/9/91 reconfirmed Emily's TMI status and recommended placement in a cross categorical class located at the Rogers School in Bloomfield Hills. The Committee recommended that 26½ hours should be in a special education setting and the remainder of the week in the general education "mainstream".

On 5/17/93, an IEPC was held to consider a change in placement to a middle school setting. The Committee recommended that Emily should be placed in "a basic classroom with mainstreaming. . ..The program stated that Emily would spend 10 hours and 50 minutes per week in special education and the remaining 19 hours and 10 minutes was to be in the regular education program. They stated that she should begin her day at West Hills Middle School at 8:30 in the Basic classroom for reading and math instruction. Social work and Speech and Language time will be part of the WHMS program.. . .She would leave WHMS at 10:40 and travel to East Hills-Middle School. At EHMS she would eat lunch and participate in regular education classes. . .with the assistance of a paraprofessional." (Sch. Ex. 3)

Mrs. Hudson did not agree with the recommendation

and requested mediation. When mediation did not resolve the issue, she requested a due process hearing.

Frank J. Wawrzaszek was mutually selected to serve as the hearing officer. In a discussion of hearable issues during a telephonic prehearing conference it became obvious that parts of the Bloomfield Hills program were administered in a unique way. Specifically, it became difficult to distinguish between the types of special education services provided by the "Student Center" and those in the "Learning Center". At the suggestion of the Local Hearing Officer (LHO), parties agreed to view the facilities and meet the teachers at Lone Pine Elementary, WHMS and EHMS. After some discussion, counsel for both parties decided to postpone the hearing and stipulate to a trial program for the 1993-94 academic year. The trial program was very similar to the recommendations of the 5/17/93 IEPC described above.

The IEPC under dispute in this hearing was held on 4/14194. The Committee found that Emily continued to be eligible for services as TMI as specified under R340.1704 and that she should be placed in a categorical program as provided under R340.1739. They found that the Least Restrictive Environment for Emily "would be at West Middle School which provides the support of the basic classroom, not available in her home school (East Hills MS). Originally 14 hours and 45 minutes per week were to be provided in special education. Support services in Speech and Language and social work were also recommended for Emily.

Mrs. Hudson did not agree with the recommendations of the IEPC and again requested a due process hearing as provided under R340.1724 of the Michigan Special

Education Rules.

Frank J. Wawrzaszek was again mutually selected to serve as the Hearing Officer on the local level. Emily Hudson was represented at the hearing by attorney Stewart Hakola from MICHIGAN PROTECTION AND ADVOCACY, of Marquette, Michigan. The Bloomfield Hills Public School District was represented by John Gierak, of the firm of DEAN AND FULKERSON, of Troy, Michigan.

A telephonic prehearing conference was held on May 4, 1994 to discuss preliminaries, to determine hearable issues, to establish timelines for the exchange of witness lists and exhibits and to set hearing dates. At the same time the LHO placed the "burden of proof" on the plaintiff, stating that "Parent party must show that the placement they request will provide Emily with an education that is more appropriate than the program recommended in the 4/14/94 IEPC." (H.O. Ex. 1)

After hearing and reviewing the testimony, transcripts, arguments and exhibits, the Hearing Officer ruled on the placement issue as follows:

DECISION:

IN THE OPINION OF THE HEARING OFFICER, THE MOST APPROPRIATE PUBLIC EDUCATION FOR EMILY HUDSON CAN BE PROVIDED AT THE WEST HILLS MIDDLE SCHOOL. THE AVAILABILITY OF THE BASIC CLASSROOM AND THE POTENTIAL FOR IMPROVED COORDINATION OF SERVICES WHILE EMILY IS IN A REGULAR CLASSROOM FAVORS THE WHMS PLACEMENT. THE LHO DOES NOT BELIEVE

THAT A CONTINUED INVOLVEMENT IN A TWO SCHOOL SETTING CAN BE SUPPORTED OR JUSTIFIED.

RATIONALE:

The appropriateness of placement was the central issue in the hearing. Parent party maintained that Emily should receive her full educational programming at the East Hills Middle School and the School District presented evidence in support of the 4/14/94 IEPC, which advocated for a placement at WHMS and a utilization of a basic classroom for part of the special education programming. As testimony came to a close and the appearance of expected parent witnesses failed to materialize, the LHO requested parties to provide information about their specific program desires for Emily. (H.O. Ex. 3) Parent's proposed program is described in H.O. Ex. 4, and the School District's proposal appeared in H.O. Ex. 5. A summary of the sample plans follows.

Parent party wants full-time placement in Emily's home school (EHMS). They suggest that the majority of the school day should be in a regular education placement but that she could be pulled out of regular education for intensive instruction in special education for 1-2 classes per day in the "Student Center". Emily may also be pulled out for Speech and Language and social work. Parent believes that with assistance from teacher consultants and the effective use of instructional aides, Emily's academic goals can be achieved in a regular classroom setting.

A summary of the BHPS sample schedule for Emily

would include full-time placement at WHMS. She would be placed in the West Hills "Learning Center" (i.e., the basic special education classroom) during the scheduled 7th grade BLOCK times and into general education courses during UNIFIED ARTS times. When possible and appropriate, regular class placement can also be provided in block classes. Primary emphasis for the completion of academic goals would be placed in the basic classroom program.

When questioned about the appropriateness of the 4/14/94 IEPC, Mrs. Hudson stated that "a lot of the goals that we wrote. . .are very appropriate. . .but I don't think that they should take place without being firmly rooted in academic(s), and I don't think that it's fair to pull the plug on Emily's future by saying that it's not appropriate for her to have science and social studies and composition and all those kinds of things that might be typical for a seventh grade student."

Mrs. Hudson continued, "I think none of us knows the extent to which Emily can achieve. It's patently unfair to say that she doesn't need that kind of stuff because she's only going to be doing something menial, and therefore we should concentrate on preparing her for existing in the menial world. That's not how I see the value of education for Emily. I want her to have seventh grade subjects. I would like help in modifying them to help to bridge the gap between what Emily's been exposed to so far in the way of academics, and where the seventh grade kids are." (Trans. pp. 842-43)

Mr. Thomas Osbeck of the Developmental Disabilities Institute of Wayne State University testified on behalf of parent party. For the past five years he has worked as

a consultant for the Michigan Inclusive Education Project. Since October of 1993, he visited Emily's home for a day and spent portions of two other days observing her in the schools.

Mr. Osbeck felt that "most of the skills that were listed in Emily's IEP could be worked on in some of her content area classes, or general education classes". (Trans. p. 968) He said that there were many things a teacher could do to increase Emily's involvement in the classroom. He recommended that placement should be at East Hills, her neighborhood school.

When asked "if he ever recommended that a student should not be included with the regular education teacher being responsible for the student's instruction?". . .He stated that. . ."in the cases that I testified, I don't recall any time that I've recommended against it". (Trans. p. 972)

David Winstrom, Ph.D. was presented as an expert witness for parent party. While he stated that he has completed training and internships in School Psychology, he is not certified to serve in that capacity. He has, however, completed training as a fully licensed clinical psychologist with specialization in Neuropsychology.

Dr. Winstrom spent 20 minutes observing Emily at WHMS, visited regular classes at EHMS and concluded his visitation and testing at the Hudson home. His tests were oriented towards neurological functioning. Specifically, he showed concern about potential visual problems and damage to lobes of the brain. He felt that Emily should be educated in the home school, that she

needs interaction with peers and not with adults. He also recommended that instruction could be provided by peers. (Trans. p. 1067)

Emily has many positive social characteristics. "According to her mother. . .Emily loves sports of all kinds, whether playing or observing. She can independently ride her bike....She is outgoing, friendly, happy, social and energetic. Other descriptors used were: confident, good self concept. . .and independent." (Sch. Ex. 2, Social Work Report) The LHO observed some of these same characteristics as he saw Emily in the corridor at WHMS, during testimony and at an after school softball game. Emily is a delightful student. She is fortunate to have a supportive, enthusiastic mother who is anxious to assist her in academic areas.

While Emily has these positive social characteristics, she has cognitive limitations which call for a level of special education assistance not currently available at EHMS.

The most recent Multidisciplinary Evaluation Team (MET) found that Emily continues to function at the Trainable Mentally Impaired level.

Marcia Hauptman, a school psychologist for the BHPS, evaluated Emily's intellectual functioning with the WISC-III. On that particular test, scaled scores range from 1-19: 10 is the average. On 10 of the 11 subtests, Emily's scaled score was 1, the remaining score was evaluated as a 2. "On the WISC III, with a chronological age of 12.5, Emily achieved a Verbal I.Q. of 48, a Performance I.Q. of 46, and a Full Scale I.Q. of 42....These scores are within the 3 to 41/: standard deviations <u>below</u> the

mean of her age peers." (Sch. Ex. 2)

Deficits in Speech and Language functioning are also highlighted in the MET report and some of her limitations in regular academic classes (i.e., World Cultures, Science and Art) are reported in the evaluation. (Sch. Ex. 2) Problems encountered in Survival Skills and Physical Education are covered in the report and in hearing testimony. (Trans. pp. 674-680 and 680-683) Emily is one of the three lowest functioning students in the WHMS basic classroom.

Her intellectual level, the deficits in language functioning, as well as her difficulties in comprehending regular education classroom materials, indicate that Emily's problems are beyond the ordinary and require a higher level of special education involvement if the intent of Michigan and federal special education law is to be met.

It may be possible that Emily's participation in regular education classes could be increased by modifying instructional approaches and through improved communications between resource personnel and regular teachers. The LHO finds it hard to believe that Emily's educational goals and objectives could be effectively reached by implementing those interventions and by increasing her exposure to regular education. In the opinion of the LHO, more appropriate progress would be made if the plan developed in the 4/14/94 IEPC was followed.

EHMS and WHMS have Student Centers. Middle School Student Centers serve as resource centers for the gifted and talented, for those students who need

help with English as a Second Language (ESL) and for "at risk" special education students who receive assistance from special education personnel.

In addition to the Student Center, WHMS has a "Learning Center" which is a noncategorical special education basic classroom. The classroom currently serves 12 students (1 AI, 3 POHI, 4 EMI and 4 TMI). During the 1993-94 trial placement, Emily was one of the 4 TMI students enrolled in the WHMS Learning Center program.

The Learning Center has a full-time teacher, a full-time and a half-time paraprofessional, and ancillary personnel (i.e., consultants in the AI and HI area as well as Speech and Language and social work). The teacher and social worker sometimes co-teach units on social skills in the Learning Center. In addition to the above personnel, the Learning Center has special materials such as ovens, kitchen tools, manipulatives, textbooks from lower grades and other materials which make it possible for the teacher to work on the goals and objectives listed in the IEP in a concrete manner while contributing to a unit of study being covered in the mainstream setting. (Trans. pp. 24-44)

The Learning Center also provides opportunities for the basic classroom teacher to continue with the development of skills (i.e., reading, math, etc.) which are ignored, or at best become secondary to subject matter in a Middle School setting. Currently Emily has a sight word vocabulary of 200 words and reads at a 1.9-2.1 grade level. In math she is able to successfully add single digit figures. The use of programs, such as Edmark, may facilitate reading instruction, and special

materials can be used to develop other needed basic and/or survival skills.

It is possible that reading (language arts) and math could be taught by a resource teacher in a more traditionally structured secondary resource room as described in R340.1749b.

Rule 49b.(1) states in appropriate part as follows:

> "A special education, secondary level resource program is designed...for eligible handicapped students who, through IEPC determination, need 3 periods or less of their instructional day in special education and who need 2 or less of the instructional content areas of language arts, mathematics, science, and social studies taught solely by the resource teacher.
>
> (2) A secondary resource teacher shall serve not more than 10 students at any one time and have a caseload of not more than 20 different students and should do either or both of the following:
>
> > (a) Provide direct instruction for special education courses approved for graduation....

> (b) Provide support to the regular education classroom teachers to whom special education student's or the resource room teacher's caseload have been assigned."

Using the above as a guideline, the LHO would have to rule that placement in a resource room at EHMS would be contraindicated at this point for the following reasons:

> (a) The 4/14/94 IEPC did not recommend the secondary resource room program. To the contrary, they drew a line through that entire section, indicating that the alternative was not appropriate. (Sch. Ex. 1, p. 3)
>
> (b) The Committee recognized that the amount of special education time Emily needed would exceed the maximum allowed in that type of placement.
>
> (c) That if reading and math and/or other subjects needed to be taught to Emily in a separate setting, they would be taught on an individual basis rather than in a group setting.

The BHPS presented Dr. Gerald Freeman as an expert witness in support of their position. Dr. Freeman has had 40 years of experience with Michigan Special Education programs. Twenty of those years were spent

in the administration of special education programs. The administrative experience included 17 years as Director of the Speech and Hearing Services at the Oakland County Intermediate School District where he was in charge of providing services to children with speech and related problems. Three additional years were spent in administering all programs at the Oakland ISD. During the last 14 years he has been a professor at Oakland University, where he has taught special education courses.

Dr. Freeman visited Emily in her program three times last year. In addition to reading her record, he observed her in the WHMS and EHMS programs for a total of nine hours. In his testimony he voiced "concerns about why Emily was spending time in educational settings that are not nurturing with respect to her education. He stated that after observing her in science class and in social studies...he was unable to observe the necessary components for promoting what (he) would view as educational opportunities....He mentioned that while Emily was not being a problem to anyone, she wasn't gaining much...in terms of what I view as her educational needs....It was apparent that the material being presented was far from her grasp."

Dr. Freeman concluded by saying that "the overriding objective with Emily should be to attempt to enable her to be as independent a young woman as she can possibly be, and that her curriculum should reflect heavily on the development of those skills which will lead to her independence. He said that he's concerned that she should be able to take care of herself. . .her environment, she should be able to understand. . .how to be safe, how to get around a community and how to

engage in what in special education is called "activities of daily living". (Trans. pp. 544-548)

Dr. Freeman stated that he saw Emily interacting, though not overwhelmingly, in the basic classroom. He stated that during one observation he saw Emily participating very actively in lesson with Mrs. Mueller. In contrast, he said that there was virtually no interaction in the regular classroom setting. (Trans. pp. 553-558)

Dr. Freeman stated that Mrs. Mueller is an excellent teacher. She's in touch with each child and has an excellent working relationship with Emily. He recommended WHMS as a better educational placement for Emily. (Trans. pp. 558-560)

During the past year there were three people who spent significant amounts of time in an educational setting with Emily. Ms. Mueller had Emily in the basic classroom at WHMS for more than two hours. Ms. DiReze provided daily consultation and instruction and spent additional time in planning a parallel program that could be implemented by the regular teacher or the instructional aide at EHMS. Mrs. Task, who is a certified teacher and is currently employed as an instructional aide at EHMS, spent 3-3½ hours per day with Emily. All three supported the program at WHMS, which included time in the basic classroom, as a more appropriate program for Emily.

Ms. Mueller felt that Emily could make better progress in oral expression, survival skills, independent functioning in the basic classroom setting. (Trans. pp. 21, 24) She stated that the Learning Center is structured for teaching in a concrete manner and that increased

time is needed in that setting if she is to meet her goals and objectives. Since Ms. Mueller meets with the regular education teachers at WHMS one day per week, and since she is available to discuss problems after school, integration in mainstream classes would be facilitated. (Trans. pp. 31, 34)

Ms. DiRezze is the coordinator of the Student Center at EHMS. She characterized the Student Center as a drop-in center for anyone in the building. Ancillary services are not delivered inside the Student Center, and it is extremely rare for a student to be assigned to the Center for direct instruction. (Trans. pp. 322-323) Many of the supports and materials needed to provide concrete instruction and to facilitate the completion of Emily's goals and objectives, do not appear to be available at the Center. Perhaps, by making the Center less stigmatizing and including "all students", the effectiveness of the Center for needed special education support in a regular education has been diminished.

Mrs. Tack served as an aide to Emily in her mainstream classes. Essentially she was involved in parallel instruction and in working with Emily in a one-on-one approach. There was substantial testimony to show that Emily has grown to be more dependent on adults as the year progressed. Mrs. Tack has stated that Emily has become more fidgety and restless in mainstream classes. She feels that 41 minutes is too long for Emily to sit still. Mrs. Tack said that Emily did not profit from survival skills class because the task she was doing took up all of the class time, making it impossible to socialize with students in that class. She testified that she has not observed any evidence of particular

friendships that Emily has developed at East Hills. (Trans. p. 696)

R340.1733 describes program and service requirements.

> Rule 33(e) states that the special education programs and services and methods of instruction shall be consistent with the short-term instructional objectives written for each handicapped person.
>
> (f) The instructional program for the school day shall focus on the individual needs of each handicapped person, as determined through the individualized education programs.

In his post hearing brief, counsel for respondent argued that "in planning for a student, the first stage of planning is to identify the needs of the student. The second stage is to establish how these needs can be addressed. The third and final stage is to determine where the program can be accommodated, in the context of the least restrictive environment. This is the order in which an IEPC plans for special education students. It is also how the District and IEPC arrived at its proposed program for Emily.

He stated that in this case, "Petitioner has decided first that Emily should attend her neighborhood school, and then decided that Emily's needs could be adequately addressed in the regular program there with the support of an aide and the Student Center. It is through Petitioner's error of focusing on where Emily should go

first that she overlooked and miscalculated the depth and breadth of Emily's needs as a Trainable Mentally Impaired child." (Respondent Post Hearing Brief, pp. 7-8)

Counsel further stated that Mrs. Hudson wanted Emily to attend East Hills instead of West Hills for the following reasons: "First, she was concerned that Emily may lose out on some after school activities if she had to attend West Hills. Second, she liked Emily to ride the bus with regular students. Third, she wanted Emily to eat lunch with regular students whom she might see in her neighborhood. Finally, and most importantly, Mrs. Hudson wants Emily to receive exposure to academic information, and Mrs. Hudson did not believe that academics is the focus of the West Hills basic classroom. Mrs. Hudson emphasized to the Hearing Officer that her most important desire for Emily's program was that it be an "academic based program". (Post Hearing Brief p. 112, Trans. pp. 839-842)

Prior to the hearing the LHO assigned the burden of proof to petitioner. In support of his position he cited Doe v Defendant No 1, 898 F2d 1186 (6th Cir. 1990) and Cordrey v Euckert, 917 F2d 1460 (1990).

In the opinion of the LHO, PETITIONER HAS NOT MET THE BURDEN. There has not been a single witness who has provided convincing evidence in support of petitioner's position that a program in the home school (EHMS) with increased involvement in regular education 7th grade academic classes, and decreased placement in special education services, will meet Emily's current educational needs.

In contrast, respondent BHPS district counsel has presented witnesses who have worked with Emily and have observed her progress and problems for a full year. District witnesses have worked in both settings. They have shown that Emily's specific goals and objectives need to be addressed in a combination of basic classroom/appropriate regular class placement. LHO believes that the preponderance of evidence supports full-time placement at WHMS.

During these proceedings, neither party seemed to advocate for a continuation of the two school placement. In fact, it was demonstrated that they found that placement to be inappropriate for Emily. In response to the LHO's request for a proposed sample program for the 1994-95 school year, petitioner responded with a plan which would place her in regular education 16 hours and 15 minutes to 22 hours and 30 minutes per week. That would mean that special education involvement would range from 13 hours and 45 minutes to as little as 7 hours and 30 minutes of a 30-hour school week. Petitioner's plan would call for a decrease in special education involvement at a time when Emily's performance in a middle school setting during the past year clearly shows that the opposite is needed.

Counsel for petitioner argues that the Individuals with Disabilities Education Act (IDEA) includes specific provisions regarding the right of students with disabilities to attend regular education programs. He quotes Congress' standard on least restrictive environment (LRE) in support of his position:

> Special classes, separate schooling, or other removal of children with disabilities

> from the regular educational environment occurs only when the nature of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Counsel continues his argument and states that "although Congress' presumption is clear, the meaning of terms such as "achieve satisfactorily" and "supplementary aids and services" has been the subject of judicial and administrative interpretation. Case law has made it clear that:

- The child need not have to achieve satisfactorily on the regular education curriculum, but on a modified curriculum focusing on the child's goals and objectives.

- The supplementary aids and services which must be provided to support the child are, due to the importance of the policy of maximum integration, extensive and include classroom aides, curriculum modifications, and provisions of supplemental special education instruction.

While he does not cite any of the case law in support of the above, he concludes that thus if Emily can. . .with all supports. . .achieve satisfactory progress on her own goals and objectives in the regular education setting, she is entitled to be placed in such a setting. (Post Hearing Brief, pp. 2-3)

Counsel for respondent presents argument in support of a higher educational expectation by citing the United States Supreme Court. In Hendrick Hudson District Board of Education v Rowley, 458 US 690, 102 S Ct 3034, 73 L Ed 2d 690 (1982).

> "When the 'mainstreaming' preference of the Act has been met and a child is being educated in the regular classrooms of a public school system, the system itself monitors the educational progress of the child. Regular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for those children who attain an adequate knowledge of the course material. The grading and advancement system thus constitutes an important factor in determining educational benefit. Children who graduate from our public school systems are considered by our society to have been 'educated' at least to the grade level they have completed, and access to an 'education' for handicapped children is precisely what Congress sought to provide in the Act."

Counsel for respondent School District further cited Ronker v Walter, 700 F2d 1058 (6th Cir. 1983), which in part addresses the strong preference in favor of mainstreaming:

> "realizing that some handicapped children simply must be educated in segregated

> facilities either because the handicapped child would not benefit from mainstreaming because any marginal benefits. . tare far outweighed by the benefits gained from services which would not be provided in the non-segregated setting.. . .Cost is a proper factor to consider since spending on one handicapped child deprives other handicapped children."

A proper perspective must be maintained in this matter. The record shows that the BHPS are committed to the inclusion of handicapped students in regular education. Dr. Filiatreau has testified that 95% of the 656 BHPS "handicapped" students are mainstreamed to the degree appropriate for their ability. Even with Emily's academic shortcomings, her proposed participation in regular education is still approximately one-half of each school day. The record has repeatedly shown that Emily could not participate in regular education, take similar tests and achieve at a level comparable to other 7th grade students as suggested in the Rowley, supra, trial standard. During the trial placement Emily was provided with a personal aide who presented a parallel instructional program. The materials were different, the tests were different and Emily's achievement in academics was minimal at best.

In the opinion of the LHO, short of adding a Learning Center for Emily at EHMS, no amount of supplementary aides and services would meet Emily's current needs. The costs involved in the replication of programs solely for placing Emily in her home school cannot be justified.

STATEMENTS OF FACT:

1. Emily Hudson has been receiving special education and support services as a "handicapped person" under R340.1702 and as (TMI) under R340.1704 of the Michigan Special Education Rules as amended.

2. During the 1993-94 academic year Emily was educated in a trial Middle School placement in the BHPS. The trial placement called for Emily's enrollment in a cross categorical basic classroom program at WHMS for the first 2 hours and 10 minutes of the school day and the remainder of the day in regular education and in the Student Center at EHMS. While Emily made some progress, the dual placement was not generally considered to be successful.

3. The most recent IEPC, dated 4/14194, recommended that Emily will attend WHMS, which provides the support of the Basic classroom, not available at EHMS. The placement was also to provide opportunities for placement in regular education classes as appropriate.

4. Support services of an instructional aide will be made available. The amount of Speech and Language (SLI) and Social work (SW) was raised to one hour per week for each service by agreement of parties prior to the hearing.

5. Instruction in a program which provides education in a basic classroom is considered essential for meeting Emily's current educational goals and objectives. It does not seem feasible to replicate that

program for Emily at EHMS when one is already available six miles away.

6. The combined regular education/special education program described in the 4/14/94 IEPC is appropriate to meet Emily's needs.

CONCLUSIONS OF LAW:

1. All of the statements of fact (1-6) appearing above also apply as conclusions in this area.

2. The superintendent of the operating school district is responsible for assigning a handicapped student to a program where special education services are to be provided. The assignment of Emily to the program at WHMS, where she can receive an appropriate education, is correct.

3. R340.1721e(3)(g) states that "beginning at age 12, a statement indicating committee consideration of prevocational/vocational education needs", is required. Since the IEPC was terminated before those program goals were considered, parties should discuss, establish and append those goals to the 4/14/94 IEPC.

4. The Oakland Intermediate School District is charged with the responsibility to ensure that this decision, or the final decision upon appeal has been implemented and to so notify the Special Education Services Area of the Michigan Department of Education.

5. These decisions shall be implemented in 15 calendar days and remain in force for a period of one

year from the date of decision in accordance with the rules of Michigan Public Act 451 and Public Act 94-142 as amended under IDEA and are subject to appeal by either party within seven (7) days as provided in R340.1725. An appeal statement, specifying party and issues of disagreement, should be directed to:

Mr. Ted Beck
Special Education Services Area
Michigan Department of Education
P.O. Box 30008
Lansing, Michigan 48909

APPENDIX E

OSEP MEMORANDUM 95-9
November 23, 1994

Judith E. Heumann, Assistant Secretary
Thomas Hehir, Director

SUMMARY

The Department of Education issued a policy memorandum to chief state school officers to provide them with guidance on the IDEA's LRE requirements. (1) It explained that the LRE requirements of Part B refer to the provision which states that the IDEA's strong preference for educating students with disabilities in regular classes with appropriate aids and supports, found in the statute at 20 USC 1412(5)(B) and implemented by the Part B regulations at 34 CFR 300.550-300.556. (2) The IDEA does not use the term "inclusion, " and thus, the Department of Education has not defined that term. What the IDEA does require is that districts place students in the LRE, which is defined in the sections cited. (3) In order to ensure placement in the LRE, IEP teams must consider the extent that the student will be able to participate in regular education programs, and what range of supplementary aids and services would facilitate the student's placement in that environment. (4) The IDEA contains no definition of the term "supplementary aids and services," but if the IEP team determines that such services are necessary, then they must be described in the student's IEP and provided to the student. (5) At a minimum, the IDEA requires that each disabled student's placement be determined annually. However, the student's parent, teacher, or

other service provider can initiate a request for review of the student's IEP at any point in time. (6) The lack of adequate personnel or resources cannot be used as an excuse by the district to relive them of their obligations to make FAPE available to disabled students in the LRE. The public agency must ensure the supply of a sufficient number of teachers who are qualified, with the needed aids and supports to provide such services in regular education environments. (7) If it is determined that a student with disabilities cannot be educated satisfactorily in regular education even with supplementary aids and services, then the student's placement team must select the option on the "continuum" of alternate placements which best meets the student's needs. The alternative placement chosen must maximize opportunities for the student to interact with nondisabled peers to the extent appropriate. (8) Although the overriding consideration in determining an appropriate placement in the individual abilities and needs of the student, other relevant factors include a comparison of the educational benefits available in the regular classroom with supplemental aids to the educational benefits available in a special education classroom, the non-academic benefits of interaction with nondisabled students, and the degree of disruption to other students which results in the inability to meet the student's needs. The Department instructed that districts cannot make placements based solely on the following factors: category of disability, severity of disability, configuration of delivery system, availability of educational or related services, availability of space, or administrative convenience. (9) Concerning the impact that a disabled student's placement can have on nondisabled students, the Department remarked that if a student is so disruptive in the regular classroom that the education of other students is significantly impaired, then

the needs of the disabled student cannot be met in that environment. Nonetheless, the district must ensure that consideration is given to the full range of supplementary aids and services that could accommodate the student in that setting prior to making such a determination. (10) The Department supports a variety of professional development and training projects that address the needs of students in inclusive programs and has financed Statewide Systems Change projects which support changing the setting for delivery of educational services from separate settings to general education settings.

Introduction

The least restrictive environment (LRE) requirements of Part B of the Individuals with Disabilities Education Act (IDEA) have been included in the law in their present form since 1975. However, these requirements continue to generate complex and interesting questions from the field. In particular, questions have been raised about the relationship of IDEA's LRE requirements to "inclusion." Consistent with our attempt to provide you and your staff with as much current information as possible and to ensure that the applicable requirements of IDEA that govern the education of students with disabilities are accurately understood and properly implemented, guidance on IDEA's LRE requirements is being provided in a question and answer format. In most cases, this question and answer document consolidates the prior policy guidance that the Department has provided in this area. We encourage you to disseminate this document to a wide range of individuals and organizations throughout your

State. Any further questions should be directed to the contact person named at the beginning of this document or to Dr. JoLeta Reynolds at (202) 205-5507.

We hope that the above questions and answers are of assistance to you and your staff as you carry out your responsibilities to ensure that disabled students are provided a free appropriate public education in the least restrictive environment.

Questions and Answers

1. What are the least restrictive environment (LRE) requirements of Part B of IDEA?

ANSWER:

In order to be eligible to receive funds under Part B of IDEA (IDEA), States must, among other conditions, assure that a free appropriate public education (FAPE) is made available to all children with specified disabilities in mandated age ranges. The term "FAPE" is defined as including, among other elements, special education and related service, provided at no cost to parents, in conformity with an individualize education program (IEP). The IEP, which contains the statement of the special education and related services to meet each disabled student's unique needs, forms the basis for the entitlement of each student with a disability to an individualized and appropriate education. IDEA further provides that States must have in place procedures assuring that, "to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special

classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." This provision, which states IDEA's strong preference for educating students with disabilities in regular classes with appropriate aids and supports, is found in the statute at 20 U.S.C. § 1412*(5)(B) and is implemented by the Department's regulations at 34 CFR §§ 300.550-300.556. Copies of the relevant statutory and regulatory provisions are attached to this question and answer document. [OMITTED]

2. Does IDEA define the term "inclusion?"

ANSWER:

IDEA does not use the term "inclusion"; consequently, the Department of Education has not defined that term. However, IDEA does require school districts to place students in the LRE. LRE means that, to the maximum extent appropriate, school districts must educate students with disabilities in the regular classroom with appropriate aids and supports, referred to as "supplementary aids and services," along with their nondisabled peers in the school they would attend if not disabled, unless a student's IEP requires some other arrangement. This requires an individualized inquiry into the unique educational needs of each disabled student in determining the possible range of aids and supports that are needed to facilitate the student's placement in the regular educational environment before a more restrictive placement is considered.

In implementing IDEA's LRE provisions, the regular classroom in the school the student would attend if not disabled is the first placement option considered for each disabled student before a more restrictive placement is considered. If the IEP of a student with a disability can be implemented satisfactorily with the provision of supplementary aids and services in the regular classroom in the school the student would attend if not disabled, that placement is the LRE placement for that student. However, if the student's IEP cannot be implemented satisfactorily in that environment, even with the provision of supplementary aids and services, the regular classroom in the school the student would attend if not disabled is not the LRE placement for that student.

3. **How can IDEA requirements be implemented to ensure that consideration is given to whether a student with a disability can be educated in the regular educational environment with the use of supplementary aids and services before a more restrictive placement is considered?**

ANSWER:

The relationship of IDEA's LRE requirements to the IEP process is key, since under IDEA, the student's IEP forms the basis for the student's placement decision. IDEA requires that the IEP of each disabled student must contain, among other components, a "statement of the specific special education and related services to be provided to the child and the extent that the child will be able to participate in regular educational programs." 34 CFR § 300.346(a)(3). At the student's IEP meeting, the extent that the student will be able to participate in regular educational programs s one of the matters to be

addressed by all of the participants on the student's IEP team before the student's IEP is finalized. In addressing this issue, the team must consider the range of supplementary aids and services, in light of the student's abilities and needs, that would facilitate the student's placement in the regular educational environment. As discussed in question 4 below, these supplementary aids and services must be described in the student's IEP. Appendix C to 34 CFR Part 300 (question 48).

4. Does IDEA define the term "supplementary aids and services?"

ANSWER:

No. However, in determining the educational placement for each disabled student, the first line of inquiry is whether the student's IEP can be implemented satisfactorily in the regular educational environment with the provision of supplementary aids and services. This requirement has been in effect since 1975 when the Education of the Handicapped Act (EHA), the predecessor to the IDEA, originally became law.

Consistent with this requirement, any modifications to the regular educational program, i.e. supplementary aids and services that the IEP team determines that the student needs to facilitate the student's placement in the regular educational environment must be described in the student's IEP and must be provided to the student. Appendix C to 34 CFR Part 300 (question 48). While determinations of what supplementary aids and services are appropriate for a particular student must be made on an individual basis, some supplementary aids and services that educators have used successfully include

modifications to the regular class curriculum, assistance of an itinerant teacher with special education training, special education training for the regular teacher, use of computer-assisted devices, provision of notetakers, and use of a resource room, to mention a few.

5. How frequently must a disabled student's placement be reviewed under IDEA?

ANSWER:

Under IDEA, each disabled student's placement must be determined at least annually, must be based on the student's IEP, and must be in the school or facility as close as possible to the student's home. Under IDEA, each student's placement decision must be made by a group of persons, including persons knowledgeable about the student, the meaning of evaluation data, and the placement options. While the student's IEP forms the basis for the placement decision, a student's IEP cannot be revised without holding another IEP meeting, which the school district is responsible for convening. If either the student's parent or teacher or other service provider wishes to initiate review of the student's IEP at a point during the school year that does not correspond with the annual IEP review, that individual can request the school district to hold another IEP meeting. If the IEP is revised, following the meeting, the placement team would need to review the student's IEP to determine if a change in placement would be needed to reflect the revised IEP.

6. If a determination is made that a student with disability can be educated in regular classes with the provision of supplementary aids and services, can the school districts refuse to

implement the student's IEP in a specific class because of the unwillingness of a particular teacher to educate that student in his or her classroom or the teacher's assertion that he or she lacks adequate training to educate that student effectively?

ANSWER:

Under IDEA, lack of adequate personnel or resources does not relieve school districts of their obligations to make FAPE available to each disable student in the least restrictive educational setting in which his or her IEP can be implemented. Exclusion of a student from an appropriate placement based solely on the student's disability is prohibited by Section 504 of the Rehabilitation Act of 1973. However, placement in a particular regular class based on the qualifications of a particular teacher is permissible under both statutes. The public agency has an affirmative responsibility to ensure the supply of sufficient numbers of teachers who are qualified, with needed aids and supports, to provide services to students with disabilities in regular educational environments, and to provide necessary training and support services to students with disabilities. The Department encourages States and school districts to develop innovative approaches to address issues surrounding resource availability. Factors that could be examined include cooperative learning, teaching styles, physical arrangements of the classroom, curriculum modifications, peer mediated supports, and equipment, to mention a few.

7. Once a determination is made that a disabled student cannot be educated satisfactorily in the regular educational environment, even with the provision of supplementary aids and services, what considerations govern placement?

ANSWER:

IDEA does not require that every student with a disability be placed in the regular classroom regardless of individual abilities and needs. This recognition that regular class placement may not be appropriate for every disabled student is reflected in the requirement that school districts make available a range of options, known as a continuum of alternative placements, to meet the unique educational needs of students with disabilities. This requirement for the continuum reinforces the importance of the individualized inquiry, not a "one size fits all" approach, in determining what placement is the LRE for each student with a disability. The options and this continuum must include "the alternative placements listed in the definition of special education under § 300.17 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions)." 34 CFR § 300.551(b)(1). These options must be available to the extent necessary to implement the IEP of each disabled student. The placement team must select the option on the continuum in which it determines that the student's IEP can be implemented. Any alternative placement selected for the student outside of the regular educational environment must maximize opportunities for the student to interact with nondisabled peers, to the extent appropriate to the needs of the student.

It also should be noted that under IDEA, parents must be given written prior notice that meets the requirements of § 300.505 a reasonable time before a public agency implements a proposal or refusal to initiate or change the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child. Consistent with this notice requirement, parents of disabled students must be informed that the public agency is required to have a full continuum of placement options, as well as about the placement options that were actually considered and the reasons why those options were rejected. 34 CFR §§ 300.504-300.505; Notice of Policy Guidance on Deaf Students Education Services, published at 57 Fed. Reg. 49274 (Oct. 30, 1992).

8. What are the permissible factors that must be considered in determining what placement is appropriate for a student with a disability? Which factors, if any, may not be considered?

ANSWER:

The overriding rule in placement is that each student's placement must be individually-determined based on the individual student's abilities and needs. As noted previously, it is the program of specialized instruction and related services contained in the student's IEP that forms the basis for the placement decision. In determining if a placement is appropriate under IDEA, the following factors are relevant:

> the educational benefits available to the disabled student in a traditional classroom, supplemented with appropriate aids and services, in comparison to the educational

benefits to the disabled student from a special education classroom;

the non-academic benefits to the disabled student from interacting with nondisabled students; and

the degree of disruption of the education of other students, resulting in the inability to meet the unique needs of the disabled student.

However, school districts may not make placements based *solely* on factors such as the following:

category of disability;
severity of disability;
configuration of delivery system;
availability of educational or related services;
availability of space; or
administrative convenience.

9. To what extent is it permissible under IDEA for school districts to consider the impact of a regular classroom placement on those students in the classroom who do not have a disability?

ANSWER:

IDEA regulations provide that in selecting the LRE, consideration is given to any potential harmful effect on the student or on the quality of services that the student needs. If a student with a disability has behavioral problems that are so disruptive in a regular classroom

that the education of other student is significantly impaired, the needs of the disabled student cannot be met in that environment. However, before making such a determination, school districts must ensure that consideration has been given to the full range of supplementary aids and services that could be provided to the student in the regular educational environment to accommodate the unique needs of the disabled student. If the placement team determines that even with the provision of supplementary aids and services, that student's IEP could not be implemented satisfactorily in the regular educational environment, that placement would be the LRE placement for that student at that particular time, because her or his unique educational needs could not be met in that setting.

While IDEA regulations permit consideration of the effect of the placement of a disabled student in a regular classroom on other students in that classroom, selected finds from Federally-funded research projects indicate that: (1) achievement test performance among students who were classmates of students with significant disabilities were equivalent or better than a comparison group (Salisbury, 1993); (2) students developed more positive attitudes towards peers with disabilities (CRI, 1992); and (3) self concept, social skills, and problem solving skills improved for all students in inclusive settings (Peck, Donaldson, & Pezzoli, 1990, Salisbury & Palombaro, 1993).[1]

10. Are there any resources that the Department is aware of that have proven helpful to educators and paraprofessionals in implementing inclusive educational programs?

ANSWER:

The Department has supported a variety of professional development and training projects (e.g., preservice, inservice, school restructuring projects) that address the needs of students with disabilities in inclusive educational programs. In addition, the Department has financed Statewide Systems Change projects which support changing the setting for delivery of educational services from separate settings to general education settings in the school that the student would attend if not disabled. Numerous materials and products have been developed by those projects which have focused on strategies that support collaborative planning and problem solving, site based control, curriculum and technological adaptations and modifications, parent and family involvement, and the creative use of human and fiscal resources. These projects have underscored the importance of timely access to resources (e.g., people, materials, information, technology) *when* they are needed.

Educators can obtain further information regarding these programs by contacting:

National Information Center for
Children and Youth with Disabilities
P.O. Box 1492
Washington, DC 20013-1492
Telephone 1-800-695-0285
(Deaf and hearing-impaired individuals may also call this number for TDD services)

Consortium on Inclusive Schooling Practices
Allegheny Singer Research Institute

320 E. North Avenue
Pittsburgh, PA 15212
Telephone (412) 359-1600
(Deaf and hearing-impaired individuals may also call the Pennsylvania Relay Services number at 1-800-654-5984)

California Research Institute on the Integration of Students with Severe Disabilities
San Francisco State University
1415 Tapia Drive
San Francisco, CA 94132
Telephone (415) 338-7847
(Deaf and hearing-impaired individuals may also call the California Relay Service number at 1-800-735-2922)

1. California Research Institute. (1992). Educational practices in integrated settings associated with positive student outcomes. *Strategies on the Inclusion on the Integration of Students with Severe Disabilities, 3*, (3) 7, 10. San Francisco State University. San Francisco, California.

Peck C.A., Donaldson J., & Pezzoli, M. (1990). Some benefits non-handicapped adolescents perceive for themselves from their social relationships with peers who have severe disabilities. *Journal of the Association for Persons with Severe Handicaps,* 15(4), 241-249.

Salisbury, C.L. (1993 November). *Effects of inclusive schooling practices: Costs to kids and organizations.* Presentation at the 1993 Conference of the Association for Persons with Severe Handicaps, Chicago, Illinois.

Salisbury, C.L., a Palombaro, M.M. (Eds.) (1993).

Salisbury, C.L., a Palombaro, M.M. (Eds.) (1993). *"No problem. Working things out our way."* State University of New York-Binghamton, Binghamton, New York.